United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,314

372

AMERICAN EXPORT ISBRANDTSEN LINES, INC.; AMERICAN MAIL LINE, LTD.; AMERICAN PRESIDENT LINES, LTD.; BLOOMFIELD STEAMSHIP COMPANY; GLOBAL BULK TRANSPORT INCORPORATED; ISTHMIAN LINES, INC.; PACIFIC FAR EAST LINE, INC.; STATES MARINE LINES, INC.; STATES STEAMSHIP COMPANY; WATERMAN STEAMSHIP CORPORATION and ATLANTIC & GULF AMERICAN FLAG BERTH OPERATORS,

Petitioners,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Petition For Review Of Federal Maritime Commission Decision

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,414

AMERICAN EXPORT ISBRANDTSEN LINES, INC.; AMFRICAN MAIL LINF, LTD.; AMERICAN PRESIDENT LINES, LTD.; BLOOMFIELD STEAMSHIP COMPANY; GLOBAL BULK TRANSPORT INCORPORATED; ISTHMIAN LINES, INC.; PACIFIC FAR EAST LINE, INC.; STATES MARINE LINES, INC.; STATES STEAMSHIP COMPANY; WATERMAN STEAMSHIP CORPORATION and ATLANTIC & GULF AMERICAN FLAG BERTH OPERATORS,

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JOINT APPENDIX

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[Served July 19, 1966-F.M.C.]

FEDERAL MARITIME COMMISSION

DOCKET NO. 66-42

IN THE MATTER OF CARRIAGE OF MILITARY CARGO

On June 16, 1966, the Military Sea Transportation Service (MSTS) issued its Request For Proposals No. 100 (RFP 100) which effectuated the previously announced intention of MSTS to place the carriage of military cargo on a competitive bid basis. Under RFP 100 any U.S.-flag steamship line desiring to carry military cargo must submit its rates for this movement under seal and guarantee that the rates will remain in effect for one year. This "open ended" bid is called a Basic Offer. A carrier whose bid is accepted is awarded a so-called Shipping Agreement and it then becomes eligible to carry military cargo. The award of Shipping Agreement is not, however, an allocation or guarantee of any specific amount of cargo. However, any carrier who submits a Basic Offer, may also bid on a "Cargo Commitment" which is a contract whereby MSTS agrees or commits itself to ship a minimum amount of cargo per sailing for a specified number of sailings. The total number of Cargo Commitments awarded, if any, would not commit in excess of 50% of the entire military movement nor would more than 50% of any one carrier's space be the subject of the contracts. The avowed purpose of MSTS in adopting the new procurement policy is to achieve savings in transportation costs through the reduced rates which it is hoped will be forthcoming under competitive bidding. The present rates on the movement in question are the result of "negotiations" between MSTS on the one hand and the U.S.-flag carriers acting concertedly as a group under a series of agreements approved by the Commission pursuant to section 15 of the

Shipping Act, 1916. The present schedule of MSTS calls for bids to be submitted by August 10, 1966, to remain firm until August 31, 1966.

A total of eleven U.S.-flag carriers [1/] have filed petitions seeking orders declaring the new procurement system under RFP 100 [2/] unlawful under the Shipping Act, 1916. It is the fear of the petitioning carrier's, just as it is the basic assumption upon which virtually all the allegations of unlawfulness are grounded however soundly, that the competitive bidding system will result in rates so low as to be noncompensatory — specifically it is feared that a 25% reduction from the present rates will result from the competitive bidding system if it is allowed to go into effect. Of course, no rates have as yet been fixed and no contracts have as yet been awarded under the new system. This fact alone dictates dismissal of the petitions as to certain of the allegations made therein. Thus, insofar as petitioners would have us declare that the new system is unlawful under sections 14 Fourth, 16 First, 17 and 18(b)(5) the petitions are, for the reasons set out below, premature, and do not present the Commission with a justiciable controversy.

Section 14 Fourth makes it unlawful for any common carrier by water to "make any unfair or unjustly discriminatory contract with any shipper based on volume of freight offered . . . ." As we have already

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1/ Petitions for declaratory orders have been filed by States Marine Lines, Inc., Isthmian Lines, Inc., Global Bulk Transport, Inc. and Bloomfield Steamship Company, joining in a single petition filed June 28, 1966; by American Mail Line, Ltd., American President Lines, Ltd., Pacific Far East Line, Inc., States Steamship Company and Waterman Steamship Corporation, joining in a single petition filed June 30, 1966; by Lykes Brothers Steamship Company, single petition filed July 11, 1966; by United States Lines Company, single petition filed July 11, 1966, and by American Export Isbrandtsen Lines Inc., single petition filed July 11, 1966.

2/ Some petitioners challenge the validity of the MSTS Request For Proposals No. 101, dated May 25, 1966. RFP No. 101 is roughly equivalent to RFP 100. Resolution of the issues concerning No. 100 will be dispositive of the issues concerning No. 101. The date for submission of bids under No. 101 has been postponed indefinitely.

noted, no contracts have been awarded for any specific volume of freight at any fixed rate. Just how the Commission is to declare this nonexistent contract to be unjust or unfair as to unspecified parties is never satisfactorily explained by petitioners. The absence of a particular contract in being renders impossible any such declaration and to the extent that the petitions seek such a declaration under section 14 Fourth they are denied as premature and failing to present a justiciable controversy.

Section 16 First makes it unlawful for a common carrier by water to give any undue or unreasonable preference or advantage to any person, locality or description of traffic or to subject any person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage. Petitioners, again assuming drastic reductions in rates because of the new bidding system, urge that such drastically reduced rates will violate section 16 First by preferring MSTS to the prejudice of all other shippers. Here again petitioners have not presented the Commission with anything it can act upon. It should be unnecessary to point out that before any rate can be declared unduly or unreasonably preferential or prejudicial you have to know what the rate is. Abstract "undueness" or "unreasonableness" is an impossible finding under the law, and the peitions to the extent that they seek such a finding under section 16 First are denied as premature for failing to present the Commission with a justiciable controversy. This conclusion is equally applicable to the allegations under section 17 which makes it unlawful for any common carrier by water in foreign commerce to "demand, collect, or charge any rate . . . which is unjustly discriminatory between shippers . . . ." For any rate to be found discriminatory there must of course be such a rate and the petitions are denied insofar as they seek any determinations under section 17 of the Act.

Finally, section 18(b)(5) of the Act directs the Commission to disapprove any rate or charge filed by a common carrier by water in foreign commerce which, after hearing, it finds "to be so unreasonably high or low as to be detrimental to the commerce of the United States." The

petitioners who raise this issue would appear to desire a kind of "two step" relief. First it would seem that the Commission should institute "an investigation . . . of rate levels in the various important military cargo trades with the aim of determining what level of rates would threaten extinction of irreplaceable United States flag shipping services." The result of this proceeding would apparently be the establishment of minimum rates to be charged by U.S.-flag carriers when tendering transportation for the military. Secondly, petitioners would have the Commission issue an order "declaring that establishment of noncompensatory rates under the new procurement policy would violate Section 18(b)(5)."

The question of the Commission's power, or lack of it, to establish across-the-board minimum rate levels for military cargo aside, the petitioners request for a general investigation of the level of rates in the "important" military cargo trades is decidedly premature. The petitioners here are not attacking the present level of rates, they are merely voicing apprehension over the rates that they and the other petitioners will themselves submit under the new procurement program. Even allowing for the substitution of competition for concerted action, the Commission as yet sees nothing to warrant the somewhat presumptious assumption that the rates fixed under the program would be so low as to threaten the extinction of irreplaceable United States flag shipping services. Here again, there are simply no rates in issue to investigate. In the rather unlikely event that such rates are fixed the Commission would, of course, act with all possible dispatch to determine their validity under section 18(b)(5). As for the issuance of an order declaring the "establishment of noncompensatory rates under the new procurement policy would violate section 18(b)(5)," the Commission considers such an order improper on two grounds.

In the first place the impact of any rate be it noncompensatory or otherwise on the foreign commerce of the United States is a question of fact which involves the balancing of the multiple interests which are included in the concept of "the foreign commerce of the United States."

The mere fact that a given rate is "noncompensatory", whatever that may mean in a given case, does not a fortiori render it detrimental to commerce. We do not construe the petitions here as requesting an evidentiary hearing, which would in any event, as we have indicated above, be premature, and we do not consider the relief requested to involve only a pure question of law. Their relief therefore should be denied for this reason alone. But the petitions could be construed as requesting that the Commission declare that any rate on military cargo fixed by a U.S.-flag carrier which is so low as to insure that carrier's demise -- presumably through bankruptcy -- would also be so low as to be detrimental to commerce within the meaning of section 18(b)(5). If this is what is requested, the Commission does not deem the declaratory order process the proper vehicle for stating the obvious. Moreover, such a declaration would serve no useful purpose now, since petitioners themselves state that even with such a declaration, "Future proceeding would then be required to determine what level of rates in each trade would be non-compensatory." Sound principles of statutory construction militate against prophetic declarations in the abstract as to the meaning of particular language. This is particularly true where, as here, the declaration would still have to be followed by proceedings based on specific situations. These proceedings are the appropriate place to determine the proper construction to be given the statute. While it might be literally possible to make such a declaration the Commission will not do so.

Accordingly, for the reasons set forth above, the petitions for declaratory orders here under consideration are, to the extent they seek determinations under sections 14 Fourth, 16 First, 17 and 18 (b)(5) are denied.

The petitions also challenge the validity of the new system under section 14b, the first paragraph of section 16 and section 16 Second. It is also urged by some of the petitioners that agreements to which they are parties signatory and which were approved under section 15 of the Act prohibit the response of these petitioners to the request for bids by MSTS.

Under section 14b petitioners assert that the Cargo Commitment is a contract "which provides lower rates to a shipper . . . who agrees to give all or any fixed portion of his patronage to such carrier . . . ." It is therefore, petitioners allege a "dual rate" contract within the meaning of section 14b of the Act which, before its use is permitted, must be filed with and approved by the Commission. Additionally, some petitioners assert that the "seal bid" requirement is an "unjust device or means" for "obtaining transportation at less than the regular rates or charges then established and enforced on the line of such carrier" because it is "essentially the same as a secret rebate." Moreover, contend petitioners', "post-contract publication of the rate does not ameliorate the effect of the concealment." Whatever may be the ultimate merit and validity of these assertions, the apparent seriousness with which they are made in view of the dire consequences predicted should they fail to prevail, the Commission will grant the petitions insofar as the three above-mentioned issues are concerned.

In the present posture of the matter we see no need for the taking of evidence as the facts relevant to the resolution of the issues involved do not appear to be in dispute. The Commission views the issues as being capable of resolution solely on the basis of MSTS Request For Proposals No. 100, dated June 15, 1966, which shall be made a part of the record in this proceeding and the provisions of any agreements approved under section 15 of the Act which any of the parties deem relevant to their ability to respond to Request For Proposals No. 100; official notice will be taken of such agreements. Should any of the parties to the proceeding consider other facts relevant to the issues herein, they may together with their brief file an affidavit setting forth such facts and a statement of their relevance to the issue or issues in question. Should any other party dispute these facts by similar affidavit the disputed issues of fact, if relevant, will be set down for evidentiary hearing.

NOW THEREFORE IT IS ORDERED, That pursuant to section 22 of the Shipping Act, 1916, a proceeding is hereby instituted to determine:

1. Whether the Cargo Commitment contract contemplated under the MSTS Request For Proposals No. 100 is a dual rate contract the approval of which by the Commission is required before its use may be permitted in the foreign commerce of the United States.
2. What, if any, specific provisions of approved section 15 Agreements would prohibit any of the carriers signatory thereto and parties to this proceeding from responding to the MSTS Request For Proposals No. 100 and if there are any whether they should be disapproved, cancelled or modified under section 15.
3. Whether the requirement that bids submitted in response to the MSTS Request For Proposals be under seal and not disclosed by the bidder line constitutes an unjust device or means for obtaining or attempting to obtain transportation at less than the regular rates and charges then established and enforced on the line of such carrier.

IT IS FURTHER ORDERED, That the proceeding is limited to the submission of briefs, affidavits of fact and oral argument on the following schedule

1. Opening briefs and affidavits of fact by July 25, 1966
2. Reply briefs by August 1, 1966
3. Oral argument on August 5 [4], 1966

An original and 15 copies of such briefs and affidavits are required and must be addressed to the Secretary, Federal Maritime Commission, Washington, D. C. 20573. Copies of any papers must also be served upon all parties hereto.

Because of the asserted need for decision in this matter prior to the deadline for submission of bids on August 10, 1966, the Commission will render its decision in this matter no later than August 9, 1966.

IT IS FURTHER ORDERED, That the persons listed in the appendix hereto are made respondents to this proceeding.

IT IS FURTHER ORDERED, That this order be published in the Federal Register, and a copy of this order be served upon respondents.

All persons (including individuals, corporations, associations, firms, partnerships, and public bodies) having an interest in this proceeding and desiring to intervene therein, should file petitions for leave to intervene in accordance with Rule 5(1) [46 CFR § 502.72] of the Commission's Rules of Practice and Procedure, on or before July 20, 1966, with copy to respondents.

By the Commission.

/s/ Thomas Lisi
Secretary

SEAL

APPENDIX

American Mail Lines
1010 Washington Building
Seattle, Washington 98101

American President Lines
601 California Street
San Francisco, California 94108

Pacific Far East Lines
141 Battery Street
San Francisco, California 94111

States Steamship Company
320 California Street
San Francisco, California 94104

Lykes Bros. Steamship Company, Inc.
1300 Gravier Street
New Orleans, Louisiana 70112

United States Lines Company
One Broadway
New York, New York 10004

American Export Isbrandtsen Lines, Inc.
26 Broadway
New York, New York 10004

Vice Admiral Glynn R. Donaho, USN
Commander
Military Sea Transportation Service
3800 Neward Street, N.W.
Washington, D. C. 20930

[Served July 19, 1966]

ADDENDUM

Add the following respondents to the list in Appendix to the order served July 19, 1966, in this proceeding:

States Marine Lines, Inc.
90 Broad Street
New York, N.Y. 10004

Global Bulk Transport, Inc.
90 Broad Street
New York, N.Y. 10004

Isthmian Lines, Inc.
90 Broad Street
New York, N.Y. 10004

Bloomfield Steamship Company
P.O. Box 1450
Houston, Texas 77001

Waterman Steamship Corporation
19 Rector Street
New York, N.Y. 10006

/s/ Thomas Lisi
Secretary

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15 June 1966

[EXCERPTS FROM]
COMPETITIVE PROCUREMENT

MSTS REQUEST FOR PROPOSALS NO. 100
(Ocean Transportation — Common Carriage)

Trade Routes

ROUTE INDEX NO.	DESCRIPTION
4	East Coast - United Kingdom and Eire
5	East Coast - Bordeaux/Hamburg Range
10	Gulf Coast - United Kingdom
11	Gulf Coast - Bordeaux/Hamburg Range
17	U.S. Great Lakes - Bordeaux/Hamburg & United Kingdom Range

1. Commander Military Sea Transportation Service (COMSTS) requests proposals for the furnishing of ocean transportation on a common carriage basis (less than shipload lots) by American flag ships operating on the route(s) identified above. This Request for Proposals (RFP) incorporates the following documents attached hereto:

Instructions to Offerors (MSTS Form 4280/4T)
Shipping Agreement (Common Carriage) (MSTS Form 4280/1T)
Description of Service and Equipment (MSTS Form 4280/3T)
Schedules of Rates (for above trade routes)
Cargo Commitment (MSTS Form 4280/2T)

2. Offers of service and rates will take into account the following:

a. The cargo to be carried will be military goods with the usual characteristics of shipments in substantial volume of a varied consist.

b. Cargo will be loaded and discharged by the Government at terminals designated by the Government in the carrier's ports of call within the trade area. Where military cargo is handled over commercial piers, the Government may require the carrier to provide its regular stevedoring services, but at the expense of the Government.

c. Cargo will move in both directions on the route(s) with varying consist and volume.

d. Basic offers will be for "open-end" contracts. Such contracts shall be the standard MSTS Shipping Agreement (MSTS Form 4280/1), the annotated version of which is attached hereto. Alternative offers may be submitted under which the Government will be committed to ship under the standard Shipping Agreement a stated minimum volume of cargo on a specified number of sailings on a particular route. Such commitment will not be awarded unless the carrier has also made a basic offer for an open-end contract. Where an award is made by which the Government is committed to ship an agreed minimum of cargo, the parties shall execute a collateral contract for a firm period of one year, such contract to be substantially in the form attached hereto as CARGO COMMITMENT (MSTS Form 4280/2T).

e. Rates are to be simplified to the maximum with commodity categories indicated in the SCHEDULE OF RATES. Unless otherwise specified therein, rates shall be stated on the basis of cents per cubic foot manifest measurement. Agreed rates are to be firm for a period of one year.

3. Shipping Agreements will be awarded to those responsible carriers who submit offers responsive to this Request for Proposals.

4. Where the Contracting Officer finds it to be in the best interest of the Government, awards will be made by which the Government will be committed to ship a minimum volume of cargo for a specified number of sailings on a particular route. It is not contemplated that the total volume of these awards will exceed approximately 50% of the Government's requirement for common carriage on the route. Further, it is not contemplated that the Government will, except possibly for special services, commit itself to use in excess of approximately 50% of the ship capability of any single carrier on a given route.

5. Awards of firm commitments by the Government to ship a minimum of cargo will be made only to those carriers whose offers of service are most favorable to the Government, price and other factors considered. Other factors will take into account any aspect of the service that relates to the overall advantage to the Government of utilizing the service offered. In making such awards, consideration will be given to the capability available to the Government from all sources. The Contracting Officer will award commitments in such number and in such amounts as found by him to be compatible with the total requirements of the Government on the route(s). In such determination, special consideration will be given to the need for flexibility and special services, as well as the level of rates offered.

6. The Government reserves the right to require a showing of financial and operational responsibility by an offeror prior to making an award.

7. Notice is given that award may be made without discussion of offers received; therefore, offers should be submitted initially on the most favorable terms from a price and technical standpoint which the offeror can submit to the Government.

8. The Contracting Officer has determined, pursuant to the requirement set forth in the Armed Services Procurement Regulation, Paragraph 3-217, that formal advertising is impracticable and that negotiation is authorized by 10 U.S.C. 2304(a)(17), the contemplated procurement beingfor commercial transportation service by a common carrier.

9. Written offers are to be submitted to Commander Military Sea Transportation Service, Department of the Navy, Washington, D.C. 20390, and MUST arrive prior to 1645 EDST 20 July 1966 and remain firm until 1645 20 August 1966. Offers should be enclosed in a sealed envelope marked "MSTS Request for Proposals No. 100 (Ocean Transportation — Common Carriage)." The Offeror's name and address should appear in the upper left hand corner, and this envelope should be enclosed in another envelope addressed to:

Commander Military Sea Transportation Service
Department of the Navy
Washington, D. C. 20390
For Delivery Only to Commercial Water Traffic
Division (M-342)

10. Offers are to contain all information required by the INSTRUCTIONS TO OFFERORS. In addition there must be submitted with each offer the following statements completed as appropriate and executed by a responsible official of the offeror:

A. Offeror represents that it is ( ), ( ) is not a small business concern. (For this purpose, a small business concern is a concern that is not dominant in its field of operation, and with its affiliates employs fewer than 500 employees).

B. Offeror represents that it ( ) has, ( ) has not employed or retained a company or person other than a full time employee to solicit or secure this contract, and agrees to furnish information relative thereto as requested by the Contracting Officer.

C. CERTIFICATE OF INDEPENDENT PRICE DETERMINATION

(a) By submission of this bid or proposal, each bidder or offeror certifies, and in the case of a joint bid or proposal, each party thereto certifies as to its own organization, that in connection with this procurement:

(1) the prices in this bid or proposal have been arrived at independently, without consultation, communication, or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other bidder or offeror or with any competitor;

(2) unless otherwise required by law, the prices which have been quoted in this bid or proposal have not been knowingly disclosed by the bidder or offeror and will not knowingly be disclosed by the bidder or offeror prior to opening, in the case of a bid, or prior to award, in the case of a proposal, directly or indirectly to any other bidder or offeror or to any competitor; and

(3) no attempt has been made or will be made by the bidder or offeror to induce any other person or firm to submit or not to submit a bid or proposal for the purpose of restricting competition.

(b) Each person signing this bid or proposal certifies that:

(1) he is the person in the bidder's or offeror's organization responsible within that organization for the decision as to the prices being bid or offered herein and that he has not participated, and will not participate, in any action contrary to (a) (1) through (a) (3) above; or

(2) (a) he is not the person in the bidder's or offeror's organization responsible within that organization for the decision as to the prices being bid or offered herein but that he has been authorized in writing to act as agent for the persons responsible for such decision in certifying that such persons have not participated, and will not participate, in any action contrary to (a) (1) through (a) (3) above, and as their agent does hereby so certify; and (b) he has not participated, and will not participate, in any action contrary to (a) (1) through (a) (3) above.

(c) This certification is not applicable to a foreign bidder or offeror submitting a bid or proposal for a contract which requires performance or delivery outside the United States, its possessions, and Puerto Rico. (Note: This is a standard clause of DOD procurement. Proposals from foreign offerors are not solicited.)

(d) A bid or proposal will not be considered for award where (a) (1), (a) (3), or (b) above has been deleted or modified. Where (a) (2) above has been deleted or modified, the bid or proposal will not be considered for award unless the bidder or offeror furnishes with the bid or proposal a signed statement which sets forth in detail the circumstances of the disclosure and the Secretary, or his designee, determines that such disclosure was not made for the purpose of restricting competition.

11. LATE PROPOSALS

(a) Proposals and modifications received at the office designated in the Request for Proposals after the close of business on the date set for receipt thereof (or after the time set for receipt if a particular time is specified) will not be considered unless:

(1) they are received before award is made: and either

(2) they are sent by registered mail, or by certified mail for which an official dated post office stamp (postmark) on the original Receipt for Certified Mail has been obtained, or by telegraph; and, it is determined by the Government that late receipt was due solely to delay in the mails, or delay by the telegraph company, for which the offeror was not responsible; or

(3) if submitted by mail or telegram, it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation: provided, that timely receipt at such installation is established upon examination of an appropriate date or time stamp (if any) or such installation, or of other documentary evidence of receipt at such installation (if readily available) within the control of such installation or of the post office serving it.

(b) Offerors using certified mail are cautioned to obtain a Receipt for Certified Mail showing a legible, dated postmark and to retain such receipt against the chance that it will be required as evidence that a late proposal was timely mailed.

(c) The time of mailing of late proposals submitted by registered or certified mail shall be deemed to be the last minute of the date showing in the postmark on the registered mail receipt or registered mail wrapper or on the Receipt for Certified Mail unless the offeror furnishes evidence from the post office station of mailing which establishes an earlier time. In the case of certified mail, the only acceptable evidence is as follows:

(i) where the Receipt for Certified Mail identifies the post office station of mailing evidence furnished by the offeror which establishes that the business day of that station ended at an earlier time, in which case the time of mailing shall be deemed to be the last minute of the business day of that station; or

(ii) an entry in ink on the Receipt for Certified Mail showing the time of mailing and the initials of the postal employee receiving the item and making the entry, with appropriate written verification of such entry from the post office station of mailing, in which case the time of mailing shall be the time shown in the entry. If the postmark on the original Receipt for Certified Mail does not show a date, the offer shall not be considered.

12. Prospective offerors should indicate in the offer the names and telephone numbers of persons authorized to conduct negotiations.

13. A pre-proposal conference will be held in connection with this Request for Proposals on 27 June 1966 at the Headquarters of Commander Military Sea Transportation Service, Atlantic Area, 58th Street and First Avenue, Brooklyn, New York, 11250. The purpose of the pre-proposal conference will be to explain or clarify any requirements of this Request for Proposals as desired by prospective offerors. The conference will be conducted by the Contracting Officer or his representative and attended by operational and legal personnel as appropriate. All questions will be publicly received and publicly answered in order that all prospective offerors will be furnished identical information in connection with the proposed procurement. Further details on this conference will be provided to all concerned by separate communication.

14. The Government reserves the right to reject any or all offers.

/s/ J. W. Lipscomb, Jr.
Captain, SC, USN
Contracting Officer

MSTS FORM 4280/4T

COMPETITIVE PROCUREMENT
(Ocean Transportation — Common Carriage)

INSTRUCTIONS TO OFFERORS

1. Basic Offer: All offerors must submit proposals based on MSTS Shipping Agreement terms and conditions, subject to a special provision that rates shall remain in effect for a period of at least one year.

2. Alternate Offers: Where a carrier requires a firm commitment by the Government to ship a minimum volume of cargo on each sailing in order to enable it to offer its best rates, or to establish service on a particular route, it may also offer one or more alternate proposals and prescribe such a minimum for each. Offers subject to shipment of a minimum of cargo will not be considered unless the carrier has also made an offer under an "open-end" Shipping Agreement.

3. It will be the goal of the Contracting Officer to obtain reasonable rates and ample service capability without making awards by which the Government is committed to ship a fixed volume of cargo on each sailing. The total of commitments for the Government to ship cargo will be kept at the lowest level at which the desired service can be obtained, considering rates and such features as frequency of sailing and types of ships.

4. Offers which do not require the Government to be committed to ship a minimum amount of cargo will be considered first. Where lower rates or improved capability would be available by the acceptance of offers that require such a commitment, the Contracting Officer will examine the alternate offers of that type to determine what combination of both types of offers would result in the procurement being made to the best advantage of the Government, price and other factors considered. Where the ships and service covered by that combination required to obtain optimum rates appears likely to restrict the flexibility

of the service on the route, the Contracting Officer will determine the level of the total of those commitments that permits the required flexibility.

5. For the purpose of making an award and in evaluating offers that do not require a commitment for the Government to ship a minimum of cargo, consideration will be given to only the rate level offered. No distinction will be made as between carriers by reason of the speed, size and configuration of the ships or the frequency of sailings. These matters will be considered only when cargo is actually booked and with respect to known cargo requirements.

6. Shipping Agreements, even without a commitment by the Government to ship a minimum of cargo, will not be awarded to those carriers who are not responsive to this Request for Proposals.

7. For the purpose of making an award and in evaluating offers that are conditioned upon a commitment by the Government to ship a minimum of cargo, first consideration will be given to the rates offered for the port(s) involved. The types of ships, their size, speed and equipment and the frequency of sailings, available under offers that require a commitment to ship cargo, will be considered in determining the level of the total of the Government's commitments to ship cargo. A commitment to ship a minimum of cargo will not be made to a carrier who offers rates with respect to which the Contracting Officer cannot make a formal determination, to be a part of the contract, that the offered rates can reasonably be expected to result in the charges paid by the Government within the period of the contract being no higher than those paid the carrier by private shippers for the carriage of like goods, the service, special obligations of the parties and all other factors considered.

8. Cargo will be booked under Shipping Agreement as necessary to discharge the Government's obligations under cargo commitment. Thereafter, cargo moving under Shipping Agreements will be booked by individual rate category in the following sequence:

a. The rate favorable carrier, providing it offers acceptable space and a schedule meeting the delivery requirements of the cargo.

b. In event the rate favorable carrier does not offer acceptable space or an acceptable delivery schedule, then to the carrier with the next higher rate who offers acceptable space and delivery.

9. The award of a Shipping Agreement without a commitment by the Government to ship a minimum of cargo is not to be considered as an allocation of cargo to the holder of such Agreement. Likewise, the award of Shipping Agreements is not to be considered as a commitment by the Government to utilize only holders of Shipping Agreements in meeting any portion of its requirements for either contract or common carriage on the related route(s). However, holders of all Shipping Agreements on a route shall, during the period of the Agreement, be protected from the competition of common carriers who do not hold Shipping Agreements for that route and from gross instability of rates as follows:

a. Should the holder of a Shipping Agreement reduce its rates on the route(s) during the period of the Agreement, its competitive position in relation to other holders of a Shipping Agreement shall be determined on the basis of its initial rates.

b. A carrier who, after the date for responses to this Request for Proposals, begins initial common carrier operations on the route(s) will be considered for a Shipping Agreement at a negotiated rate level, but such carrier will not be utilized except on an as required basis when capability is not available for the requirement from the original holders of Shipping Agreements.

c. Common carriers who do not within the time specified respond to this Request for Proposals, or who do respond but do not receive an award, will be utilized on an as required basis only and at their filed tariff rates under a Standard Government Bill of Lading, with the certifications pertaining to the rates charged as required by the General Accounting Office.

10. The Offeror will be required, if given an award, to file the rates and terms of the Shipping Agreement in accordance with applicable regulations of the Federal Maritime Commission.

11. The rates contained in an offer of break bulk service shall be submitted in the format of the SCHEDULE OF RATES (SECTION II) for the applicable trade route. Rates for container service shall be set forth generally as outlined in Attachment IIB of the SCHEDULE OF RATES. All offers shall be accompanied by the certificates set forth in the Request for Proposals, together with the following:

a. A Statement setting forth the nature of the company and, if incorporated, the state of incorporation, the names and addresses of officers and the names and addresses and citizenship of persons holding 10 percent or more of the outstanding stock.

b. A description of service and equipment prepared in accordance with the attached MSTS Form 4280/3(T).

12. Special Notes.

a. A separate SCHEDULE OF RATES (SECTION II) is provided for each Trade Route indicated in this Request for Proposals. Rate proposals are required only for such trade route(s) as the offeror intends to offer service under the Shipping Agreement.

b. Offerors will submit rate proposals on all rate categories for which their ships are configured. Separate rates will be indicated for outbound and inbound movements.

c. Rates for each cargo category shall apply to the entire range of the trade route unless otherwise provided in the attached SCHEDULE OF RATES form.

d. Rates for any category shall be independent of rates for other cargo categories. The Government reserves the right to reject offers based on a required mix of commodities within any one category or upon any required mix of cargo categories.

e. The rates, terms, and conditions for carriage of mail and mail equipment are established by the Post Office Department and are not subject to negotiation.

MSTS Form No. 4280/1(T)

DEPARTMENT OF THE NAVY
MILITARY SEA TRANSPORTATION SERVICE
WASHINGTON, D. C. 20390

SHIPPING AGREEMENT [1/]
(COMMON CARRIAGE)
(Annotated Edition)

CONTRACT NO. N0003367C _____

DATE _____

CARRIER, _____

ADDRESS AND _____

STATE OF INCORPORATION _____

_____

ROUTE(S) _____

_____

_____

This SHIPPING AGREEMENT (COMMON CARRIAGE) is entered into as of the date shown above, at Washington, D. C., by and between the UNITED STATES OF AMERICA (hereinafter called the "Government") represented by the Contracting Officer executing this Agreement, and the corporation shown above as Carrier duly incorporated as there indicated, (hereinafter called the "Carrier" or the "Contractor").

THE BASIC TERMS FOR CARRIAGE OF CARGO UNDER MSTS SHIPPING AGREEMENT (COMMON CARRIAGE), (hereinafter sometimes called the "Basic Terms"), MSTS FORM 4280/1A(T), and the SCHEDULE OF RATES, as and when agreed upon by and between the Government and the Carrier, are hereby incorporated into this Agreement. [2/]

[1/] The title is intended to distinguish the form from the earlier "Shipping Contract" and to emphasize the common carriage nature of the service. The format on page 1 is designed to place all identification data in close proximity for ease of typing.

[2/] It is contemplated that the SCHEDULE OF RATES will be separately agreed by the parties, and such agreement noted on the face of the Schedule. The effective date of the Schedule may vary route by route, or revision by revision, as agreed by the parties.

This Agreement is a continuing tender of ocean transportation services. It shall become effective for the route(s) designated above upon the effective date or dates of the SCHEDULE OF RATES for such route(s) and shall remain in force until terminated. Except during any period stated in the SCHEDULE OF RATES as the minimum duration of such rates, this Agreement may be terminated by either party upon written notice to the other of not less than sixty (60) days prior to the effective date of such termination, provided, however, it may at any time be terminated by the Carrier pursuant to paragraph 3 of the Introduction to the Basic Terms. Termination of this Agreement shall not affect any Shipping Order issued and accepted prior to the effective date of the termination.

Upon the effective date of this Agreement with respect to each route listed herein, any previously existing Shipping Contract between the parties and relating to that route shall terminate upon accomplishment of all outstanding Shipping Orders under such contract.

IN WITNESS WHEREOF the parties hereto have executed this Agreement as of the day and year first above written.

_____
(Carrier)

By _____

_____
(Title)

THE UNITED STATES OF AMERICA

By _____
Contracting Officer
Military Sea Transportation Service
Department of the Navy

MSTS Form 4280/1A(T)

[EXCERPTS FROM]
BASIC TERMS FOR CARRIAGE OF CARGO
UNDER MSTS SHIPPING AGREEMENT
(COMMON CARRIAGE)

Introduction

1. These Basic Terms consist of three parts: Part I, Conditions of Service; Part II, Standard Maritime Clauses; and Part III, Standard Government Contract Clauses. Each of these Parts is issued in consecutively numbered pages, and each page bears the date of its publication. When a Part is revised by changing or deleting a provision therein or by adding additional provisions, the page or pages upon which the changed or deleted provision(s) appeared or at which a new provisior is to be added will be cancelled and removed from the Part and a new page or new pages reflecting the revision and bearing the number and date of publication of the revision, will be substituted for the cancelled page(s). 1/

2. Revisions of Parts I and II shall become effective by the mutual consent of the Government and the Carrier expressed by the execution of a brief amendment to the Shipping Agreement incorporating the revision by reference.

3. Revisions of Part III shall be accomplished unilaterally by the Government, and any revision of Part III shall become binding thirty (30) days after receipt by the Carrier of written notice of the revision. If the Carrier shall find such a revision unacceptable, it may terminate the Shipping Agreement either as of the date upon which the revision would become binding, or as of an earlier date, by giving the Government fifteen (15) days notice prior to the effective date of such termination. 2/

1/ At regular intervals MSTS will furnish each holder of the contract with a Revision Check Sheet listing all revisions as of that date.

2/ Part III comprises uniform Department of Defense contract clauses required by statute, or by regulation with force of statute, or by Department of Defense directives. This part will be revised as and when required to conform to statutes or Executive Orders. Other revisions to meet Department of Defense requirements will be effected at regular intervals, but such provisions shall not be retroactive.

PART I (Annotated Edition)

CONDITIONS OF SERVICE

ARTICLE I: 1. DESCRIPTION OF SERVICES.[1/]

The Carrier represents that it is a common carrier by water within the meaning of the Shipping Act of 1916, as amended; that it operates an established berth service on the trade route(s) described on Page A of this Agreement; and that it maintains on such route(s) regularly scheduled sailings of United States Flag vessels. The Carrier further represents that it offers berth service on the named route(s) to the public for the carriage of commodities having the general shipping characteristics of those for which service may be performed under this Agreement. The term "berth service" as used in this Agreement means regularly scheduled common carrier service to the general public at duly published rates, terms and conditions. In carrying cargoes for the Government in any of its scheduled vessels as provided in this Agreement, the Carrier shall carry as a common carrier.

ARTICLE I: 2. TERMS OF CONTRACTUAL RELATIONSHIP.

(a) The purpose of this Agreement is to establish the terms under which the Carrier offers to accomplish ocean transportation of such lawful cargo (except as provided in subparagraph (b) below) as may be tendered from time to time by the Government for carriage under the Agreement. When cargo is finally stowed aboard and the manifest prepared, a Shipping Order in the form attached hereto as Appendix A (MSTS Form 4612-2) will be issued by the Government for the cargo loaded. The Shipping Order

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1/ Certain carriers have contended that the Shipping Contract provides for contract carriage, not common carriage. Article 1 of the Shipping Agreement is intended to make clear that Agreements are entered into only with a carrier who is established as a common carrier on the route(s) covered, that the contracting carrier offers to carry for the public at published rates goods similar to those carried for the Government, and that the carriage for the Government is common carriage.

shall constitute the contract of carriage, and all the terms of this Agreement shall be deemed as incorporated therein as a part thereof.[2/] The Contracting Officer shall provide the Carrier with written notice of the Military Sea Transportation Service activities which are authorized to issue Shipping Orders.

(b) The Carrier shall have the right to reject for shipment under this Agreement any specie, live animals, or any cargo deemed to be dangerous or obnoxious in character other than such cargo for which a commodity rate is provided herein.

(c) The United States Carriage of Goods by Sea Act (46 U.S.C. 1300-1315) is incorporated into this Agreement and shall apply to the carriage of all goods under any Shipping Order with the same force and effect as if the Act applied to such carriage by express provision therein except that as to deck cargo, the Government shall bear the risk of perils inherent in deck carriage; however, in case of loss, damage, or shrinkage in transit, the rules and conditions governing commercial shipments shall not apply as to the period within which claim therefor shall be made or suit instituted; and in the case of loss or damage to cargo not shipped in packages, the limit of liability of the Carrier shall be $500 per measurement ton.[3/] The carriage of cargo under any Shipping Order issued pursuant to this Agreement shall not be deemed or construed to be the carriage of cargo pursuant to special terms and

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[2/] The Shipping Agreement establishes an arrangement whereby the Carrier offers to carry such cargo as the Government tenders for carriage under the simplified rate structure and agreed terms. Those rates and terms are invoked by the issuance of a Shipping Order, which, when accepted by the Carrier, becomes a firm contract of carriage that incorporates the agreed rates and terms.

[3/] It is intended to incorporate the COGSA, other than as expressly excepted in a standard form of GBL, so as to apply to all shipments, including those in the domestic trade and those from foreign port to foreign port. As the "customary freight unit" may be a cubic foot, the statutory $500 limitation on the Carrier's liability for cargo not packaged is modified so as to establish the pertinent unit to be a M/T. The Government will bear the risks of peril inherent in deck carriage.

conditions as provided for in Section 6 of the Act;[4/] and nothing in this Agreement is intended to relieve the Carrier or the vessel from liability for loss or damage to or in connection with the goods arising from negligence, fault, or failure in the duties and obligations provided by the Act or to lessen such liability otherwise than as provided therein.[5/]

(d) Freight shall be earned upon delivery of cargo at destination.[6/]

(e) Nothing in this Agreement shall be construed as restricting competition in any manner or as precluding the Government from obtaining transportation from the Carrier on the route(s) covered herein under the published tariffs of the Carrier that are available to the public, provided goods to be so carried shall be tendered in accordance with the terms and conditions of those tariffs and for carriage under a standard form of Government Bill of Lading.[7/] The Carrier shall upon request and payment of a reasonable charge provide the Contracting Officer with a copy of each of its published tariffs and any revision thereof for the route(s) covered herein.[8/]

[4/] Certain Carriers have contended that Services under the Shipping Contract fall within Sec. 6 of the COGSA to reduce the duties of the Carrier. That position is expressly negated by this provision.

[5/] Substantially the language of the COGSA. Inserted for emphasis and ready reference in contract administration. See note 4.

[6/] Inserted at direction of Comptroller DOD and Comptroller Navy. Places payment obligation substantially on same basis as provided in standard form GBL.

[7/] Inserted to leave no doubt in the Carrier's mind that the Government does not by the execution of a Shipping Agreement intend to agree that all military cargo moving on berth vessels must be tendered under the simplified rates, and to emphasize the right of the Government to tender cargo for carriage under rates and terms available to the public.

[8/] Inserted to assist the Contracting Officer to compare Shipping Agreement commodity rates, if any, and tariff terms with those offered to the general public.

ARTICLE I: 3. COMPENSATION.

Compensation for carriage of goods under this Agreement shall be in accordance with the SCHEDULE OF RATES. Billing shall be in accordance with MSTS Shipping Agreement Standard Instructions, MSTS Form _____.

ARTICLE I: 4. PAYMENT.

(a) When the vessel shall have been loaded, the Carrier may submit properly certified invoices, or vouchers, with respect to the Shipping Order to the Military Sea Transportation Service activity designated in the Shipping Order. Upon delivery of the cargo at the port(s) of destination, the Carrier shall be paid the freight due under the invoice or voucher. In the event there should be a conflict between the Shipping Order and its related manifest, payment of freight may, at the discretion of the Government, be made on the basis of the tonnage and cargo shown on the manifest.[9/]

(b) Delivery of cargo at destination and accomplishment of the Shipping Order may, for purposes of payment of freight, be established either by a copy of a receipt therefor signed by the Consignee or its agent or upon certification of delivery by the originating Contracting Officer based on information available to him within the Government. For purposes of payment of freight, delivery of cargo shall be deemed to occur upon discharge of cargo at destination or upon expiration of 48 hours

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9/ The "paying document" is the Shipping Order. However, experience has shown that errors made in the preparation of the Shipping Order are sometimes revealed from examination of the manifest. This provision permits the more detailed document to prevail when properly endorsed by the Contracting Officer.

after the ship presents at destination for such discharge, whichever is earlier.[10/]

(c) Upon delivery, if there is any damage to or shortage of cargo not definitely known to be the fault of the Government or its agents, and it is considered by the Contracting Officer that withholding of certain monies is necessary to protect the interests of the Government, pending final determination of the amount of shortage or damage and the Carrier's liability therefor, the dollar amount of such shortage or damage may be estimated and withheld from sums owing to the Carrier from the Government under any Shipping Order. Likewise, the Government may recover overpayments of freight under one Shipping Order by withholding from sums due the Carrier under any other Shipping Order.[11/]

(d) All charges and expenses incurred for the account of the Government as provided in this Agreement and which are not paid directly by the Government or by the Consignee, shall be paid by the Carrier, who shall be reimbursed upon the presentation of properly supported and certified invoices.

[10/] This provision will permit immediate payment of invoices for freight without waiting for arrival of the signed receipt. The Contracting Officer's certification may be based on a telegraphic delivery or arrival report or upon other evidence acceptable to the Contracting Officer. It is assumed that, in actual practice, invoices will be presented soon after loading and that they will be fully processed for payment except for determination of delivery, and hence can be paid promptly.

[11/] Sums due under one contract in Admiralty may not always be held to pay claims arising under another contract in Admiralty. This provision permits the Government to pay freight in full regardless of known cargo claims arising out of the carriage. Upon final settlement, the Government is assured that funds will be available to pay the claims. Also, where prompt payment requires payment of freight subject to later audit, overpayment can be withheld from sums due the Carrier from other Shipping Orders.

[12/] This provision establishes the machinery by which the Carrier protects itself from delays or inconvenience arising from disputes or delayed decisions as to which of the contracting parties is liable for costs properly incurred in the accomplishment of the carriage or as a result of the carriage. Examples: disputes with terminal facilities, repair costs for damage to the vessel in loading or discharging, etc.

ARTICLE I: 5. LOADING AND DISCHARGING.

(a) Except as hereinafter provided, the cargo shall be laden and discharged at a dock or wharf, place or open roadstead designated by the Carrier. Within a vessel's port of call, the Government may require that the vessel call at, or shift to, any particular dock, wharf, place or open roadstead at which the vessel can lie always safely afloat at any time or tide, or at which in the judgment of the master the vessel may lie safely aground, and to and from which the vessel may safely proceed, when the aggregate of the cargo to be loaded or of the cargo to be discharged at such location will meet the minimum tonnage, or revenue requirement for shifting set forth in the SCHEDULE OF RATES. When the minimum requirement will not be met, the Contracting Officer may nevertheless require that the vessel shift to such a particular dock, wharf, place or open roadstead, in which case the direct costs of such shift shall be reimbursed by the Government. Nothing herein shall be construed as a warranty by the Government of berths, or the approaches thereto, at facilities owned or operated by or for the Carrier or at other commercial facilities normally utilized by ships the size of the Carrier's vessel to load or discharge cargo. 13/

* * * * *

13/ This paragraph is revised to be consistent with the common carriage nature of the service and the general use of those standards applicable to such service. Within the limits of the first sentence, the Carrier will designate the berth, except where the Government meets the minimum requirements for the particular berth as set out in the SCHEDULE OF RATES, or in an emergency. The minimum requirement can vary by ports and be changed from time to time by means of the simplified amendment procedure applicable to the SCHEDULE OF RATES. The minimum requirement relates to any facility designated by the Government, thereby doing away with disputes as to whether a particular terminal is an "Army or Navy terminal." It also establishes that the Government, like any other user of a common carrier's berth service, does not have any responsibility for the safety of the berths at which the Carrier or other berth term operators normally load or discharge commercial cargo.

ARTICLE I: 15. FEDERAL MARITIME COMMISSION.

The Carrier agrees to comply expeditiously with such regulations of the Federal Maritime Commission as may be applicable to the filing of rates set out in the SCHEDULE OF RATES for service to the Government in the carriage of military cargo.

MSTS FORM 4280/1B(T)

BASIC TERMS FOR CARRIAGE OF CARGO
UNDER MSTS SHIPPING AGREEMENT
(COMMON CARRIAGE)

PART II (Annotated Edition)

STANDARD MARITIME CLAUSES

* * * * *

MSTS FORM 4280/1C(T)

BASIC TERMS FOR CARRIAGE OF CARGO
UNDER MSTS SHIPPING AGREEMENT
(COMMON CARRIAGE)

PART III

STANDARD GOVERNMENT CLAUSES

* * * * *

MSTS Form 4280/1D(T) Date 13 June 1966

SHIPPING AGREEMENT
APPENDIX B [1]

Specific Items of Cost in Connection with Performance Under Articles I:5 and I:6 and Agreed Determination of Cost Responsibility as Between the Parties

* * * * *

SHIPPING AGREEMENT

SCHEDULE OF RATES [1]

TABLE OF CONTENTS

* * * * *

[EXCERPTS FROM]
MSTS SHIPPING AGREEMENT

N0003367C _____ 1/

Effective Date _____

SCHEDULE OF RATES

SECTION I: UNIFORM NOTES

1. NATURE AND EXECUTION

a. This SCHEDULE OF RATES is an agreement which, upon execution, is incorporated into the above-designated MSTS Shipping Agreement. The SCHEDULE OF RATES consists of SECTION I, UNIFORM NOTES, and SECTION II, RATES.

b. The provisions of SECTION I shall apply to all routes included in this SCHEDULE OF RATES unless an exception or addition is noted as to a particular route.

c. SECTION II consists of an index page of all routes to which the above-designated Shipping Agreement may apply and a separate Statement of Rates for each such route for which the parties have negotiated rates. As a Statement of Rates for a particular route is agreed upon, it will be assigned a number to be entered in the index. The Statement of Rates for a route shall state the categories of cargo or mail that may be carried on that route under the Shipping Agreement and the rate(s) for freight for each such category. The rate(s) for the transportation of supercargoes assigned by the Government to accompany cargo may also be listed. An addition or exception for a particular route to the provisions of SECTION I shall be stated as a SPECIAL NOTE to the Statement of Rates for that route. The pages of each Statement of Rates shall be separately and consecutively numbered and each page shall show the total number of pages in that Statement of Rates.

d. This SCHEDULE OF RATES shall be executed by signature of the parties on the last page of SECTION I and on the last page of

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1/ Number and date of the related Shipping Agreement.

each Statement of Rates as the same is agreed upon by the parties and included in SECTION II.

2. ADDITIONS AND REVISIONS

a. Except during any minimum period for which the parties have agreed that rates stated in SECTION II shall remain effective, this SCHEDULE OF RATES including SECTION II may be amended by the parties in the following manner. Either party may propose in writing that all or a portion of the SCHEDULE OF RATES be amended. No later than thirty (30) days from receipt of such proposal the parties shall undertake to negotiate such an amendment and, if agreement is not reached within sixty (60) days from the commencement of such negotiations, the Carrier shall have the option of withdrawing that portion of the SCHEDULE OF RATES which is the subject of the dispute, such withdrawal being effective after thirty (30) days notice in writing to the Government and being subject to the requirements of applicable statutes and of rules or regulations of cognizant Government agencies.

b. When provisions of the SCHEDULE OF RATES are so amended, the page or pages on which such provisions appear shall be removed from the SCHEDULE OF RATES and a new page or pages shall be inserted therein. Each new page inserted in the SCHEDULE OF RATES shall be executed by the parties on the reverse side of the page, except that when an entire Statement of Rates is revised, the new Statement of Rates may be executed on the last page. When an amendment results in an alteration in the number of pages in a Statement of Rates, the pages will be renumbered and the number indicating the total pages in that Statement of Rates will be revised to reflect such change. New pages resulting from an amendment will indicate the date on which such amendment became effective.

* * * * *

SCHEDULE OF RATES
SECTION II
STATEMENT OF RATES

EAST COAST — UNITED KINGDOM & EIRE
(TRADE ROUTE)

ROUTE INDEX NO. 4
EFFECTIVE DATE:

1. RATES FOR CARGO: All rates are stated per measurement ton (40 cubic feet) MANIFEST MEASURE, unless otherwise specified, and are applicable for one (1) year from effective date unless otherwise indicated above:

COMMODITY OR CATEGORY	CONUS OUTBOUND	CONUS INBOUND
1. CARGO NOS		
2. WHEELED OR TRACKED VEHICLES (UNBOXED) UP TO AND INCLUDING 10,000 LBS. PER UNIT		
3. WHEELED OR TRACKED VEHICLES (UNBOXED) EXCEEDING 10,000 LBS. PER UNIT		
4. REFRIGERATED CARGO		
5. HAZARDOUS CARGO		
6. CARGO CONTAINERS (EMPTY)	XXXXXXX	
7. DECK CARGO (SEE NOTE)	%	%

NOTE: "Deck Cargo" is defined as cargo in categories 1, 2, 3, or 6 above when stowed on deck. Such carriage shall be at shipper's risk and expense. Price will be stated as a percentage reduction of the under deck category rate.

2. EXCEPTED CATEGORIES: The following cargo is excepted from above rates. Rates will be negotiated at the time of booking.

AIRCRAFT (UNBOXED)
BOATS
BULK CARGO
EXPLOSIVES
UNBOXED GUNS
UNUSUAL SIZE CARGO
WEIGHT CARGO (In quantities in excess of 250 Long Tons)

3. CONTAINER SERVICE: See ATTACHMENT II B (if applicable).

4. MAIL AND MAIL EQUIPMENT: Standard rates, terms and conditions applicable are as set forth in ATTACHMENT II A.

5. RATES FOR SUPERCARGOES: The Government shall have the right to designate one or more supercargoes who the Carrier will transport at the rate set forth below, such rate to include victuals and suitable accommodations:

SUPERCARGO $ _____ per man per day

6. MINIMUM SERVICE REQUIREMENTS:

a. The rates stated herein are based on a schedule of not less than one sailing per month between the U. S. East Coast and the United Kingdom and Eire.

b. When offering space in any sailing from ports in the New York-Norfolk portion of the East Coast, the Carrier will offer a choice of at least two ports of loading where military cargo normally generates (choice of ports to be Carrier's).

[ROUTE INDICES 5, 10, 11, 17 OMITTED]

* * * * *

ATTACHMENT II A

SCHEDULE OF RATES, TERMS AND CONDITIONS APPLICABLE TO THE FIO SHIPMENT OF U.S. MILITARY MAIL UNDER MSTS SHIPPING AGREEMENT

* * * * *

MSTS FORM 4280/3 (T)

[EXCERPTS FROM]
SHIPPING AGREEMENT

DESCRIPTION OF SERVICE AND EQUIPMENT

PART I – DESCRIPTION OF SERVICE (TRADE ROUTE) 1/

PART II – DESCRIPTION OF SHIP TYPES (TRADE ROUTE) 2/

NOTE: 1. OFFEROR MUST COMPLETE SEPARATE FORM FOR EACH TRADE ROUTE IN WHICH SERVICE IS OFFERED UNDER SHIPPING AGREEMENT SCHEDULE OF RATES (SECTION II).

2. OFFEROR MUST COMPLETE SEPARATE FORM FOR EACH TYPE OF SHIP WHICH WILL BE EMPLOYED IN REGULAR SERVICE IN THE TRADE ROUTE. WHERE A CARRIER EMPLOYS THE SAME TYPE SHIP IN MORE THAN ONE TRADE ROUTE, PARTS E THROUGH M MAY BE COMPLETED BY APPROPRIATE CROSS REFERENCE TO DATA SUPPLIED ORIGINALLY FOR THE OTHER TRADE ROUTE.

* * * * *

ATTACHMENT II B

RATES, TERMS AND CONDITIONS APPLICABLE TO CONTAINER SERVICE

1. CONTAINER SERVICE is defined as the movement of cargo in Contractor owner or operated containers. Such containers may differ in exterior size and interior cubic capacity but all such containers will at all times provide adequate protection of cargo while in transit. The Containers may or may not be vehicular in type.

2. Prospective Shipping Agreement Contractors should submit a separate proposal under this Request for Proposals (RFP) for any container service which they intend to offer for Government cargo in any trade route for which offers of service are requested by the accompanying RFP.

3. Such proposals may offer service between designated military ocean terminals, between designated commercial ocean terminals, from specified port drayage areas to specified port drayage areas, or any combination thereof.

4. In the event such proposals are made, basic ocean transportation rates should be stated for cargo categories as follows:

a. Container Cargo NOS (dry)
b. Refrigerated Container Cargo NOS

5. In addition to rates for the basic ocean transportation service, proposals should describe in detail the service offered and specify accessorial charges applicable such as stuffing containers, container demurrage, minimum charges per container, etc.

6. Operators offering container service shall describe their equipment, where applicable, in accordance with Part III of the Description of Equipment, and include a supplementary description of the service offered where the format of the description of service and equipment is not adequate.

7. Offers of Container Service will be evaluated within the mode on the basis of total cost to the Government. Offers of break-bulk service will be evaluated against offers of Container Service on the basis of the requirements of the particular cargo; and when both modes are available and acceptable, preference will be given to that mode offering the lowest overall cost to the Government.

[Appendix A]

CARGO COMMITMENT

Under Shipping Agreement No. ____

MSTS Form 4280/2(T)
(Date) _____

1. This Agreement made and entered into by _____, hereinafter called the "Carrier," and the United States of America, acting by and through Military Sea Transportation Service, hereinafter called the "Government."

2. WITNESS:

Whereas the parties have as of this date entered into a Shipping Agreement as designated above for the carriage by the Carrier of military cargo on the route(s) described in said Shipping Agreement, hereinafter called the "Agreement"; and whereas the parties desire to make certain modifications in and additions to the Agreement,

3. NOW THEREFORE: The Carrier agrees to provide space and the Government agrees to book military cargo on the ships of the Carrier operating on said route(s) under the terms set forth in the Agreement and in the minimum amount(s) stated in Annex A hereto.

4. As a means of implementing said mutual commitment, the parties further agree as follows:

a. During the period of this Agreement, the Carrier will on the 15th day of each month provide the Contracting Officer, or his designated representative, with a proposed schedule for the following month showing sailings during said period of all its ships operating on the route(s) described in the Agreement. Such schedule will indicate the name of each ship and the planned arrival dates at its ports of call, together with the gross capability to be available to the Government on the voyage. The Carrier will keep the Government advised of changes in the schedule. Prior to the withdrawal of any portion of ship capability, the Carrier will notify the Government and the latter shall have not less than four hours during a working day to book cargo to the space proposed for withdrawal. Ten (10) days before a ship is scheduled to call at a particular port on the schedule, the Carrier shall offer the Contracting Officer specific spaces on the ship, such space to be acceptable for military cargo and adequate in volume to meet the Government's commitment to ship cargo. The Government will book cargo with the Carrier for the ship in accordance with procedures to be agreed upon. In the event a ship should miss its initial schedule for a particular port by as much as five (5) working days, the Government may at its option be released from its commitment to ship cargo on the ship at the port unless the Carrier shall have notified the Government in writing of a change in arrival time at least ten (10) days prior to the initially scheduled arrival of the ship at such port.

b. Should the Government fail to ship cargo to fulfill its commitment on a particular sailing by a deficit of more than five (5) per cent of the total cargo required to meet its commitment, it shall pay for the full deficit in its commitment at the rate stated for dead freight in Annex A.

c. The commitment of the Government to ship cargo under the Agreement is directly related to the ships and service described in Annex A. Changes in the ships or the service that materially affect the obligation of the Government, whether or not caused by factors within

the control of the Carrier, shall entitle the Government to terminate its commitment under this Agreement upon written notice to the Carrier to restore within 60 days substantially the original service and failure of the Carrier so to do.

d. To the extent the Carrier fails for any reason to make acceptable space available to the Government on a sailing of its ships on the route in an amount required for the Government to meet its commitment to ship cargo, the Carrier shall pay the Government for its default at the rate per MT of such deficit as stated in Annex A; provided, however, that the Carrier shall be excused from its commitment to furnish ship capability to extent its default is caused by force majeure, including strikes.

5. Notwithstanding the provision of the Agreement pertaining to termination, the parties agree that the Agreement shall remain in effect for a period of one year from the date of this modifying Agreement, subject to termination by election of the Government under para. 4.c. herein.

6. All Standard Government Clauses, or amendments thereto, contained in Part III of the Agreement are incorporated herein by reference.

7. The Contracting Officer has determined that payment by the Government of the rates set forth in the SCHEDULE OF RATES, incorporated in the Agreement, cannot reasonably be anticipated to result in the Government paying charges for ocean transportation in excess of those paid to the Carrier by private shippers for the carriage of like goods, the nature of the service, the special obligations of the parties and all other factors considered.

8. Dated as of the day and year first above stated.

_____
(Carrier)

By_____

_____
(Title)

Military Sea Transportation Service

By _____
Contracting Officer

Before the
FEDERAL MARITIME COMMISSION
Docket No. 66-42

IN THE MATTER OF CARRIAGE OF
MILITARY CARGO

July 25, 1966

CITY OF WASHINGTON)
) SS:
DISTRICT OF COLUMBIA)

AFFIDAVIT OF EDWIN A. WESTER

Edwin A. Wester, being duly sworn, does depose and say as follows:

1. I am Vice President, Vessel Scheduling and Cargo Control, Pacific Far East Line, Inc. which has its headquarters at 141 Battery Street, San Francisco, California. I have been familiar with the common carrier transport of defense cargoes since commercial shipping resumed after World War II in 1946.

2. West Coast American Flag Berth Operators (hereafter "WCAFBO") is a group of common carrier steamship lines organized under Agreement 8186, approved by the Federal Maritime Board on November 26, 1956. I was in 1956 and 1960, and have since 1964 been "spokesman" for the group. The position of spokesman is equivalent to that of "chairman." It is ordinarily filled by annual rotation among the member lines, but the circumstances of the past several years have prevented my replacement.

3. WCAFBO was organized to provide a central organization through which the lines serving from the West Coast to the Far East could negotiate rates for and deal with the day-to-day problems concerning the ocean transport of Defense Department cargoes by Military Sea Transportation Service (hereafter "MSTS").

A. Historical

4. The large movement of military cargo after World War II was handled by the Army and the Navy. They used space contracts, by which payment was made for cubic foot of vessel space occupied. The rate was initially fixed by the Army, and followed by the Navy. Cargo was allocated among the lines serving the trade.

5. MSTS was organized in 1950 to handle the ocean transport of military cargo. They wanted to get away from the vessel space basis of the Army-Navy contracts. They could not, however, use commercial berth term contracts, which include charges for cargo loading and discharge, because the Army and Navy terminals wished to continue to do their own stevedoring. In consequence they developed a shipping contract form which based rates on the dock-side measurement of the cargo, and converted the existing Army-Navy space contract on the assumption of a 20% broken stowage factor when the cargo was loaded into the ship.

6. In developing the form of contract, and in working out the many problems arising from the new system of cargo shipment, MSTS at first tried to deal with all the interested lines in the industry. This proved to be an impossible way to conduct business; the 20 or 30 lines represented could not agree among themselves and, even when in agreement, were too many to permit orderly discussion. These accordingly developed in a very short time an informal committee representation, first for the Atlantic, Gulf and West Coasts separately and then shortly reduced to an Atlantic & Gulf Committee and a West Coast Committee. By 1956 the duties of these committees had grown to the point that a formal organization and a full-time staff was necessary. Accordingly WCAFBO and its Atlantic & Gulf counterpart were organized in 1956 under agreements approved by the Federal Maritime Board under Section 15 of the Shipping Act, 1916.

7. The MSTS shipping contract as finally evolved sets rates per cubic foot for general cargo and for about 15 special categories,

such for example as refrigerated cargo and ammunition. The contract does not bind the carrier to provide space, nor MSTS to supply cargo. It is a sort of open-end offer on each side, with the rate and other terms fixed if cargo is booked. In fact very substantial quantities of cargo have always moved under the contracts. The common carrier movement of MSTS cargoes to all areas from the West Coast under the contracts has recently been running at about 200-300 thousand measurement tons (40 cubic feet) per month.

8. Shipping costs have, of course, risen markedly since 1950. These have been reflected in MSTS shipping contract rates by the following procedures: The West Coast lines would individually request a rate increase. WCAFBO would organize data showing in line-by-line detail the increases in vessel operating costs since the last rate was established, based on a formula established by MSTS. MSTS would examine this data with great care and there would in due course follow several days of hard negotiation between MSTS and WCAFBO over the extent of the cost increase. MSTS would usually allow two-thirds of the finally agreed cost increase. The one-third discount was because the lines had not until recently supplied data on overhead and depreciation.

9. I am not aware of any charge by anyone that the WCAFBO rates for MSTS cargoes are unreasonably high. The Federal Maritime Commission, has, however, in Docket 65-13 conducted a year long investigation into the rates charged on Government cargoes. That investigation is still in course and the positions of the parties have not yet been briefed. I can only say, accordingly, that WCAFBO introduced into evidence the following rate analyses, none of which met substantial challenge on cross-examination.

(a) MSTS shipping contract rates have risen 36 per cent since 1950, while the rates on representative commercial commodities have risen 66 per cent.

(b) In 1965 all the MSTS commodities shipped on 13 vessels

of WCAFBO vessels were rated out under commercial tariffs; the result indicated about a 40 per cent discount for MSTS cargoes from commercial tariff rates.

(c) In 1965-1966 the steamship lines conducted the most elaborate accounting analysis ever made in the industry to determine the costs and profits of MSTS and commercial cargoes. The result in the WCAFBO trade showed a profit of 6.4 cents per cubic foot of vessel space used for MSTS cargo and of 10.3 cents per cubic foot for comparable commercial cargoes, again indicating an MSTS discount of about 40 per cent.

B. The Competitive Bidding Proposal

10. The steamship industry has for nearly a century past been convinced that rate competition among a group of steamship lines for an important block of cargo is bound to produce cut-throat competition which in a short time will drive the rates down toward the cargo handling costs. This is because all costs of a liner voyage are fixed in advance except the costs directly incurred for handling cargo and the vessel time in loading and discharge. In result, any rate above cargo-related costs (about 25 per cent of total costs) is preferable to empty space. To avoid this result, which so far as I know has invariably resulted when there is active rate competition among a group of lines, the shipping laws have ever since 1916 authorized conference of carriers whose function is to fix rates by agreement.

11. (a) MSTS from its formation in 1950 until the past year has been, equally with the industry, convinced that its cargoes should not be put up for competitive bidding. W. Lyle Bull, was Commercial Shipping Adviser, MSTS, from 1950 through 1959. On July 21, 1961, he executed an affidavit (supplied in FMC Docket 910 and introduced in FMC Docket 65-13), paragraph 8 of which reads:

> "It was occasionally suggested within the ranks of MSTS that the military cargoes ought to be put up for competitive bidding by the various berth lines. That view was never adopted

by MSTS. There were as I recall at least three compelling reasons why this should not be done: (a) the Government procurement officers were operating a nation-wide complex of supply and distribution, and were bound to place their orders in terms which would produce the lowest landed cost. If ocean freight was a variable and unknown factor procurement could easily become an incoherent series of guesses. (b) MSTS recognized the Government's policy to maintain a healthy merchant marine under the United States flag. If the enormous volume of MSTS traffic were put up for award to the lowest bid, there would be an inevitable pressure toward reducing rates down toward the bare cost of handling the cargo, with seriously injurious effects upon all the lines and jeopardizing the existence of those lines which failed to obtain the MSTS business. (c) Finally, MSTS as any other part of the government was under an imperative obligation to deal equally with all who did business with it, and a series of competitive bids for particular movements in particular trades could not have failed to have produced a large number of apparent or real discriminations among the several lines. For these and similar reasons a competitive organization of the MSTS general cargo movement was never seriously considered."

(b) In an exhibit introduced by MSTS in Docket 65-13, MSTS explained that it was not required by the Armed Services Procurement Act or Regulation to use competitive bidding procedures because of the statutory exception in 49 U.S.C. 65(a).

12. On April 4, 1966, the Deputy Assistant Secretary of Defense (Logistics and Transportation) announced in the course of testimony in FMC Docket 65-13 that the Secretary of Defense had determined that beginning about July 1, 1966, MSTS cargoes in the major trades would be offered under competitive bidding procedures. He testified that Military Traffic Management and Terminal Service (hereafter "MTMTS"), the agency with primary responsibility for defense

transport had not been consulted and that MSTS itself had been advised only a few days before.

13. The Deputy Assistant Secretary has testified as to this competitive bidding procedure in FMC Docket 65-13, before the Joint Economic Committee of Congress, and before the Senate Committee on Commerce. He has never suggested that the procedures were necessary to improve the efficiency of transport or in any way to provide better service during the Viet Nam operation. It has been justified solely upon the ground that it was expected to reduce the cost of ocean transport. He has repeatedly testified that savings of about 25 per cent were expected. The cost study referred to in paragraph 9(c) above would indicate a loss of 4.7 cents per cubic foot for MSTS cargo if the revenue were reduced by 25 per cent.

14. The detailed implementation of this new procedure has not yet been announced. The Deputy Assistant Secretary has, however, testified that: The Department would, if the service were satisfactory, accept the lowest bid. The contract period was expected to be one year or longer. It would not reject a rate because it was non-compensatory. The Department recognized that some lines might be forced out of business. Rates for MSTS cargoes would no longer be uniform; the Department intended to abandon its allocation system and to direct its cargo first to the lowest bidder, and when his capacity was filled then to the next lowest bidder, and so on down the line.

15. On May 3, 1966, Senators Magnuson and Brewster introduced S. 3297. The bill would amend the Shipping Act to authorize reduced rates for MSTS cargo; require that the rates be fair and reasonable and not exceed commercial rates; authorize MSTS to require any cost and price data it wishes; provide for the negotiation of rates, with either MSTS or the carrier authorized if agreement could not be reached to petition the FMC to determine a fair and reasonable rate, and provide for continuation of the present system of equitable allocation of MSTS cargoes among the carriers in the trade. Hearings were held on May 9 and 10, and the Committee report is awaited. Congressman

Garmatz on May 25, 1966, introduced a similar bill, H.R. 15283, and hearings are scheduled on June 27, 28 and 29. Senator Magnuson, Chairman of the Senate Commerce Committee and Congressman Rivers, Chairman of the House Armed Services Committee, has each addressed the Secretary of Defense requesting that institution of the competitive bidding system be delayed until the Congress can during this session consider S. 3297 and H.R. 15283. As shown in the following paragraphs, these requests have not been honored.

16. Upon information and belief, based upon the testimony of the Deputy Assistant Secretary and more recent discussions with knowledgeable persons, the Department intends to incorporate competitive bidding for some or all of the major trades in which MSTS cargo moves in July. The injury to the West Coast lines from a competitive bidding system is, however, even more imminent.

C. The MSTS Movements from the West Coast

17. There has in recent months been an MSTS movement on liner vessels from California to the Far East and Southeast Asia of about 150,000 measurement tons a month. This has occupied more than half of the outbound space of the lines serving that trade.

18. It has been known for several months past that MSTS was privately negotiating containership contracts with Sea-Land Service, Inc. and Sea Train, Inc. Neither line now serves the trans-Pacific trade. Repeated demands by one or more of the WCAFBO members, made of the Commander of MSTS and the Secretary of Navy, to know the terms of the negotiations and to be allowed to participate or to offer equivalent service, were all rebuffed. On May 25, 1966, MSTS announced that it had concluded two year contracts with both lines, totalling about $22,500,000 in annual volume. The Sea Land service is to involve 30 sailings a year from Oakland, California, to Okinawa with a guaranteed volume of cargo: the Sea Train service involves the charter of three vessels to MSTS. On information and belief the Sea Train vessels are to start service from the Atlantic to the Far East and will

thereafter be shifted to service from California. The WCAFBO members estimate that the two contracts cover the movement of about 42,000 measurement tons a month for Sea Land and about 30,000 measurement tons for Sea Train. When the Sea Train vessels are serving from California they with Sea Land will represent about one-half of the recent movement of MSTS cargo from California to the Far East carried by berth line operators.

19. The part of the cargoes remaining after this private deal will, MSTS has announced, be put up for competitive bid among the lines regularly serving the trade. This is being done in two stages: On May 25, 1966, the same day that the Sea Land/Sea Train contracts were announced, MSTS advertised for competitive proposals to handle 8,000 measurement tons a month to the Philippines and 44,000 measurement tons a month to Viet Nam. Officers in MSTS have informally advised that the MSTS movements are likely to be substantially increased, so it is difficult to predict the volume of cargo left for the second stage of competitive bidding. The volume of cargo in the second stage of competitive bidding is, however, unimportant. After 20 years of equitable allocation of MSTS cargoes among the lines serving the trade, the Department of Defense and MSTS have suddenly awarded a major part of the California/Far East cargo to favored lines while refusing even to advise the regular carriers in the trade of the terms and conditions being negotiated, and propose to award what is left after these private deals among the established carriers by competitive bidding.

20. The May 25, 1966, invitation to bid is attached to this affidavit as Exhibit A. It asks for proposals from any continental U.S. port but on information and belief the service is expected by MSTS to be from the West Coast. It calls preferably for a containership operation, but apparently advises that container movements by conventional ships will be considered. A firm period of not to exceed two years is contemplated. The bid is to specify the proposed rate. The contractor is to spot containers at designated areas in the port areas, transport them to the terminal, load, discharge overseas, and return empty containers. A

bi-weekly service is required. Oddly enough, the Government will accomplish inland transport in the Philippines but the contractor is to do so (up to 10-20 miles from port) in Viet Nam. Elaborate provisions to ensure the independence and the secrecy of each line's bid are included. Sealed bids are to be submitted by June 24 and are to remain firm until July 15 by which time the award will be made. I have no idea how a steamship line can submit a "firm offer" when so many of the costs ancillary to the ocean transport are undefined and subject to the order of MSTS. But, unless the bidding is enjoined or unless we are prepared to lose without trying this further major block of MSTS cargo, I see no alternative, if the bidding proceeds, but to try to formulate a bid.

D. The Conference Requirements

21. The Pacific Westbound Conference (hereafter "PWC") covers the trade from the U.S. Pacific Coast to the Far East. It was approved as Shipping Board Agreement No. 57 in 1923. PWC has ever since World War II contained in its tariff rules an exception for MSTS cargo carried by member lines. That exception has been in two significantly different forms:

(a) From 1946-1950 Emergency Rule, Item 4, of the PWC tariff declared "the rates on U.S. Military Cargo shall be open when shipped by the U.S. War Department cosigned by itself to itself and carried on vessels operated by any member line." This means that the conference relinquished all jurisdiction and the member lines were free to quote, bid or negotiate any rate they chose.

(b) From 1951 to the present, Item 1 of the Emergency Rule, has provided that "member lines are permitted to negotiate special rates or charters with Military Sea Transportation Service without violating Conference Rules and Regulations." I do not consider that submission of a sealed bid under competitive bidding is the "negotiation" of a rate, and doubt that any member of PWC would so consider it.

22. Each of the WCAFBO members serving the Far East outbound from the Pacific Coast of the United States is a member of PWC and has agreed in Article 1 of the Agreement that all freight "shall be charged and collected by the parties hereto, strictly in accordance with the tariff of rates and charges agreed to by the parties." Damages for a breach of the agreement are fixed at four times the freight up to a maximum of $25,000 and surety in that amount has been deposited by each line. If Item 1 does not authorize sealed-bid competitive bidding, each of the plaintiff lines would seem obliged to bid either the PWC tariff rate, which is an impossibility for the conglamerate MSTS cargo for which bids are invited, or the rate last negotiated under the exception of Item 1.

23. If, contrary to my view, rate "negotiation" includes sealed-bid, competitive bidding, a competitive response to the May 25, 1966 invitation would not place plaintiffs in violation of the PWC tariff but would instead place it in violation of our WCAFBO agreement. Agreement FMB-8186 provides in par. 2 that --

> "2. That they may meet from time to time and discuss cargo transportation costs, space availability, sailing schedules, and related matters, and agree as to rates, terms, and conditions of carriage of such cargo, and as to matters relating thereto, which are to be used as a basis for discussions with Military Sea Transportation Service and said related Shipper Services for the purpose of negotiating rates, terms, and conditions for the carriage of such cargo; they may also negotiate as a body rates, terms, and conditions which become binding on all parties hereto."

We have been advised by counsel that the rate "negotiation" there described does not include competitive bidding and that any responses to the May 25, 1966, invitation must be made individually, and outside WCAFBO. If, however, the term "negotiation" does include sealed-bid, competitive bidding in the PWC tariff, then it would seem in that

event that our counsel's advice is wrong and that WCAFBO agreement both authorizes joint preparation of bids and makes the last shipping contract rate binding on all bidders unless a new rate is jointly determined.

E. The Injury to Plaintiffs

24. Over the post-war years, MSTS cargo has been 30-40 per cent of the outbound cargoes of the U.S.-flag lines serving from the U.S. Pacific Coast to the Far East. Quite obviously services have been built and vessels constructed or acquired to handle this MSTS cargo. The plaintiff lines have made this investment in faith of a continuation of the established policy of equitable allocation of MSTS cargo among the lines serving the trade, under reasonable rates negotiated with MSTS. If the Department of Defense can, as it intends to do, suddenly change the rules and substitute competitive bidding for joint rate-making, investments of many millions of dollars have been jeopardized or lost.

25. It is not possible to be precise as to the extent of this investment, nor to say that ship A would have been built and ship B would not have been built had the plaintiff known, when they reached their decision to build or acquire vessels, that MSTS would in 1966 require competitive bidding. The fair allocation of MSTS cargo has for 20 years been an integral and inseparable part of the trade for U.S.-flag vessels. Two general conclusions are, however, obviously true.

(a) States Marine Line and Waterman Steamship Corporation, the unsubsidized plaintiff lines, have throughout the post-war years carried very large quantities of MSTS cargoes. Without that cargo they cannot continue on the Trans-Pacific service.

(b) The four subsidized plaintiffs carry substantially more commercial cargo and less MSTS cargo than the unsubsidized lines. Nevertheless MSTS cargoes, again before the Viet Nam build-up, were about 50 per cent of their outbound cargoes and about 30 per cent of their total cargoes in their trans-Pacific services. Any of these lines which is cut off from MSTS cargoes has over-built its fleet, and has one vessel out of three or four in its trans-Pacific service which is surplus to its needs. A rough and conservative estimate is that each of the four subsidized plaintiffs has two vessels which become redundant it is foreclosed from significant quantities of MSTS cargoes. As the considerable majority of their ships are of post-war construction, this two vessel redundant investment was acquired at a cost of between $5 million and $7 million per vessel.

26. Competitive bidding does not, of course, mean that all lines will lose all their MSTS cargoes. But it does mean that some line or lines will lose virtually all its MSTS cargo. For every low bidder there has to be a high bidder. One or several of the plaintiffs will either lose the utility of its MSTS-induced investment, if subsidized, or be forced out of the trade, if unsubsidized.

27. The plaintiff's injury is not confined to the line or lines that are shut out of MSTS cargoes but reaches also to those who bid low enough to get sizeable quantities of MSTS cargoes. The MSTS cargo volume is too large and too important to risk losing.

I should be surprised if any line in normal times would dare to risk the loss of this cargo by bidding high enough so that all costs and a fair profit were returned to it. Its officials would be only too aware that other lines would be considering a bid which did not cover profit, and still others a bid which covered cash operating expenditures but nothing for depreciation or overhead, while a line determined to stay in business might bid even less so that it could be assured of a sizeable volume of MSTS cargo, which would offer some contribution to joint vessel expense which would otherwise have all to be borne by commercial cargo alone. I do not pretend to know where this would all come out but it is my judgment, supported by the unbroken history of steamship trades where lines are forced into competitive bidding against each other, that in ordinary circumstances any line which puts in a successful bid for MSTS cargo will be carrying it at a loss.

28. It is true that with the Viet Nam operation, MSTS is in great need of vessel space while there is little or no empty space in the out-bound liners. This might under the ordinary laws of supply and demand produce high bids. But unless the lines cancel, on 60 days notice, their MSTS shipping contracts, MSTS may simply reject any bid over the present contract rate and continue to use the shipping contract.

29. The May 25 invitation for sealed bids, competitive proposals has so many ambiguities and uncertainties that it is quite impossible to frame a competitive bid in response. Yet after cargoes amounting to half of the current need of the California/Far East MSTS movement have been awarded in secret negotiations to two favored lines, and

with the present movement representing a great part of the balance of the current movement, I do not see that any line can dare let it go unbid without risking the loss of all MSTS cargo. If all lines bid, most are going to be unsuccessful. The lowest bidder will be the one to whom the traffic is so important that he has lowered his bid more than any other. That will almost certainly represent a below-cost bid.

30. If the competitive bidding procedure is unlawful, and is not enjoined, the successful bidder among those who respond to the June 14 invitation will find himself in an unfortunate dilemma. He will have to make investments, which will be very large if vessels must be acquired or converted under his proposal, to carry out the contract. Yet if the contract is unlawful for violation of the Shipping Act, it could not be carried out after decision to that effect.

31. If competitive bidding for MSTS cargo were enjoined as unlawful, any new or different service desired by MSTS could readily be worked out in negotiation with WCAFBO and AGAFBO. There are ample data and full authority for MSTS to assure itself that rates are fair and reasonable. If that orderly procedure is abandoned for competitive bidding, MSTS will be obtaining a rate reduction at the highly probable costs of destroying some of the plaintiffs and impoverishing the others.

/s/ Edwin A. Wester

[JURAT this 8th day of June, 1966]

REPLY BRIEF OF STATES MARINE LINES, INC.
ISTHMIAN LINES, INC., GLOBAL BULK TRANSPORT INCORPORATED
AND BLOOMFIELD STEAMSHIP COMPANY

* * * * *

III.

APPLICABILITY OF SECTION 14b TO
THE SHIPPING AGREEMENT

At page 19 of the MSTS Brief there appears the suggestion that

> "If an analogy is to be drawn, we submit that it is the Basic Officer under RFP-100 which may be compared to the Section 14b contract."

The MSTS Brief then says that the Basic Offer under RFP-100

> "is indistinguishable from the shipping contracts which have been in effect between DOD and the individual carriers for many years."

The first quotation is correct, the second wrong. The situation is different under RFP-100 competitive procurement than under prior practice because under RFP-100 procurement the agency promises to favor the low bidder in all its shipments for an entire year. Under the earlier practice MSTS did not promise any such thing - there was no tie.

Thus, while the Cargo Commitment is an obvious tying device, the bidding procedures for the "open-end" Shipping Agreements under RFP-100, when coupled with MSTS's promise to favor the low bidder, are a somewhat more subtle tying device. In terms of the statute, 14b is applicable to "open-end" Shipping Agreements under 14b if the MSTS promise of favor amounts to granting the favored line "all or a fixed portion" of the MSTS cargo on a route.

RFP 100 spells out in detail the schedule of MSTS preference under the annual Shipping Agreement.[13/] After Cargo Commitment shipments, which come first,

> ". . . cargo moving under Shipping Agreements will be booked by individual rate category in the following sequence:
>
> a. The rate favorable carrier, providing it offers acceptable space and a schedule meeting the delivery requirements of the cargo.

13/ "Instructions to Offerors," MSTS Form 4280/4T, paragraph 8.

b. In event the rate favorable carrier does not offer acceptable space or an acceptable delivery schedule, then to the carrier with the next higher rate who offers acceptable space and delivery."

In other words, MSTS promises, under the Shipping Agreement, to book all cargo with the rate favorable carrier for a year, if service is satisfactory. In a particular trade, then, if the rate favorable carrier has frequent enough service, the Shipping Agreement, coupled with MSTS' reciprocal promise, is very plainly a dual-rate contract under Section 14b promising lower rates in return for all MSTS cargo on the route. In other trades, the rate favorable carrier may get 70% or 80% or 99% of the cargo during a year. The exact percentage is not known, but RFP-100 describes the procedures for reaching the percentage.

We can thus distinguish two questions:

(1) As a pure matter of law, is the MSTS promise to favor the rate favorable carrier a promise of "all or a fixed portion" of MSTS cargo? If so, the Shipping Agreement is subject to Section 14b, since it meets all other parts of the statutory definition of a dual-rate contract.[14/]

(2) As a mixed question of law and fact, when in a particular trade MSTS is as a matter of fact giving all or a set portion of its cargo pursuant to its promise to favor, is this giving "all or a fixed portion" of MSTS cargo to the favored carrier? If so, section 14b applies to the Shipping Agreement.

As a pure question of law, we think there are ample grounds for the Commission to hold that the promise to favor the rate favorable carrier whenever space and schedule suit is a promise of "all or a fixed portion" of MSTS cargo. "All cargo" is not an absolute under 14b.

14/ "Lower rates" are provided to "a shipper or consignee" (MSTS) "who agrees to give all or any fixed portion of his patronage."

Section 14b itself requires that any dual rate contract include a clause which "(1) permits prompt release of the contract shipper. . . with respect to any shipment or shipments for which the contracting carrier. . . cannot provide as much space as the contract shipper shall require on reasonable notice. . ."

The essence of a dual rate contract is the tie between shipper and carrier - preferential low rate in return for preferential promise of cargo. Under RFP 100 procurement the proposed Shipping Agreement is such a tie because the low rate under it is offered in return for the promise of cargo. In intent and in terms, the tying situation which 14b was passed to regulate is present.

While the application of the law to the Shipping Agreement / preferential shipment tie is plain, in previous cases the Commission has indicated its preference for an evidentiary hearing in which the effect of such ties can be explored before reaching its conclusions.[15/] Such a hearing is in any event required before any dual rate contract can be approved under Section 14b.

Accordingly, so long as RFP-100 is not effectuated prior to Commission decision, it would be appropriate and would not delay matters for the Commission to set for hearing both the question of the applicability of 14b to the Shipping Agreement / preferential shipment arrangement and approvability of this or any modified arrangement[16/] under 14b.

Petitioners prefer, and urge on the Commission, an immediate declaration that 14b applies and is violated. However, if a hearing is ordered, we will cooperate in reaching a rapid decision.

15/ For example, Docket 66-3, North Atlantic Mediterranean Freight Conference-Martrans Contract (May 2, 1966), ___ F.M.C. ___, 7 SRR 149

16/ The arrangement as it stands is flatly prohibited because it does not include the eight enumerated required clauses.

CONCLUSION

The Commission should find and declare that Section 14b is applicable to: (1) Cargo Commitment MSTS Form 4280/2(T); (2) Shipping Agreement (Common Carriage) MSTS Form 4280/1(T) coupled with the MSTS agreements to favor contained in RFP 100; that Commission approval is required before use of such contracts; that permission has not been obtained; and that it is illegal to carry out such contracts in whole or part, directly or indirectly.

Respectfully submitted,

[Signatures Omitted]

August 1, 1966

[Served August 9, 1966, F.M.C.]

FEDERAL MARITIME COMMISSION

DOCKET NO. 66-42

IN THE MATTER OF THE
CARRIAGE OF MILITARY CARGO

The Cargo Commitment Contract found not to be a dual rate contract within the meaning of section 14b of the Shipping Act, 1916.

Item No. 1 of Local Freight Tariff No. 1-Y-FMC-1 of the Pacific Westbound Conference and Agreement 8086 construed not to prohibit certain petitioners from participation in the proposed competitive procurement program of the Military Sea Transport Service, Department of Defense in its present form and coverage.

The requirement that bidding under the proposed procurement program be under seal and "secret" does not constitute an "unjust or unfair device or means within" the first paragraph of section 16.

Warner W. Gardner, Robert T. Basseches and James B. Goodbody for petitioners American Mail Line, Ltd., American President Lines, Ltd., Pacific Far East Lines, Inc., States Steamship Company and Waterman Steamship Corporation.

George F. Galland, Robert N. Kharasch, Philip F. Hudock, and J.K. Adams for petitioners States Marine Lines, Inc., Isthmian Lines, Inc., Global Bulk Transport Incorporated, Bloomfield Steamship Company.

Richard W. Kurrus for petitioner American Export Lines, Inc., Wilbur L. Morse, William W. Parker and Howard A. Levy for the Military Sea Transport Service, Department of Defense.

Donald J. Brunner, Hearing Counsel.

Mitchell W. Rabbino for intervenor Sapphire Steamship Lines, Inc., Elmer C. Maddy and John Williams for intervenor Atlantic & Gulf American Flag Berth Operators.

REPORT

BY THE COMMISSION: (John Harllee, Chairman; Ashton C. Barrett, George H. Hearn, Commissioners)*

This proceeding is before us on petitions seeking orders declaring

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* Vice Chairman John S. Patterson did not participate.

unlawful the proposed competitive procurement program of the Military Sea Transportation Service Department of Defense. In all, twelve U.S. flag steamship lines filed five petitions for declaratory order, [1/] and still others intervened. [2/] By order served July 19, 1966, we agreed to hear three of the issues raised in the petitions and declined to entertain the other issues urged therein because they were premature and did not present us with justiciable controversies. [3/]

THE PROPOSED COMPETITIVE PROCUREMENT PROGRAM

On June 16, 1966, the Military Sea Transportation Service (MSTS) issued Request For Proposals No. 100 (RFP 100) containing the terms and conditions under which the Department of Defense proposed to extend its competitive procurement program to ocean transportation. The program is open to U.S. flag steamship lines only. [4/]

1/ States Marine Lines, Inc., Isthmian Lines, Inc., Global Bulk Transport Incorporated and Bloomfield Steamship Company, joint petition filed June 30, 1966; American Mail Line, Ltd., American President Lines, Ltd., Pacific Far East Lines, Inc., States Steamship Company and Waterman Steamship Corporation joint petition filed June 30, 1966; American Export Isbrandtsen Lines, Inc. single petition filed July 11, 1966; Lykes Brothers Steamship Company single petition filed July 11, 1966; United States Lines Company, single petition filed July 11, 1966.

2/ Intervenors were: Sapphire Steamship Lines, Inc. and the U.S. flag lines parties to Atlantic & Gulf American Flag Berth Operators, Agreement No. 8186; Alcoa Steamship Company, Inc.; American Export Isbrandtsen Lines, Inc.; American President Lines, Ltd.; American Union Transport, Inc.; Bloomfield Steamship Company; Central Gulf Steamship Corporation; Farrell Lines, Incorporated; Grace Line Inc.; Great Lakes Bengal Lines, Inc.; Isthmian Lines, Inc.; Lykes Bros. Steamship Co., Inc.; Moore-McCormack Lines, Incorporated; Pacific Seafarers, Inc.; Prudential Steamship Corporation; States Marine Lines - Joint Service; United States Lines Company.

3/ Our disposition of the various issues raised in the petitions is discussed infra.

4/ Department of Defense cargo is reserved to U.S. flag carriers by the Cargo Preference Act, 1904 (10 U.S.C. 2631).

Under RFP 100, any line desiring to carry military cargo (offeror) must submit a "basic offer" which is simply a quotation of the rates at which the offeror will carry military cargoes. These rates must be guaranteed for a period of one year. The basic offer must be submitted under seal and the offeror certifies that he has reached his bid independently without consultation with or disclosure to any other offeror, or he must certify as to the conditions and circumstances of the consultation or disclosure, if any, has occurred.

Upon analysis of all basic offers, MSTS will enter into Shipping Agreements with the selected offerors.[5/] Shipping Agreements are awarded on the basis of the lowest rates offered, but there does not appear to be any limit to the number of Shipping Agreements which may be awarded on any given trade route. The award of a Shipping Agreement does not constitute the allocation to the selected offeror of any specific amount or portion of the cargo to be shipped in the trade. Actual bookings of cargo under Shipping Agreements are made first with the rate-favorable carrier, provided he offers suitable space and an acceptable schedule of delivery. Failing this, the cargo is booked with the line offering the next highest rate, and so on.

The holder of a Shipping Agreement is "protected from competition" of other common carriers on the route in question including those who hold Shipping Agreements as well as those who do not. Thus, if another holder of a Shipping Agreement reduces his rate, his competitive position vis-a-vis other holders is considered on the basis of the rate originally bid; and, while a carrier new to the trade may be awarded a Shipping Agreement, his service is used only if the original holders on that route cannot provide suitable service; and, finally, lines who either did not bid or were not awarded Shipping Agreements will be used only if the services or capabilities of the holders on the route are inadequate.

5/ The Shipping Agreement is the standard contract of MSTS for ocean transportation and is in three parts: Part I, Description of Services; Part II, Standard Maritime Clauses, and Part III Standard Government Clauses.

Any line which makes a basic offer may also, if it feels that "a firm commitment to ship a minimum volume of cargo on each sailing in order to enable it to offer its best rates, or to establish service on a particular route", submit an alternate offer. Offers based on minimum volume will not be considered unless the line has also submitted a "basic offer". If an alternate offer is accepted, a "Cargo Commitment" is entered into.

Under the Cargo Commitment, the line agrees to furnish space in specified amounts on each of its sailings and the government agrees to provide a minimum volume of cargo for each sailing. Default on the part of either party results in payment of "dead freight" under the terms and conditions set forth in the contract.[6/]

The government does not contemplate, except possibly for special services, that Cargo Commitments will be awarded to exceed 50% of the total government requirement on any given route or that any individual Cargo Commitment will result in the use of more than 50% of the space of any single carrier on a given route.

When awards are made, either on basic offers or under Cargo Commitments, all rates must be filed with the Commission.

6/ Article 4b provides: "Should the Government fail to ship cargo to fulfill its commitment on a particular sailing by a deficit of more than five (5) per cent of the total cargo required to meet its commitment, it shall pay for the full deficit in its commitment at the rate states for dead freight in Annex A". Similarly, Article 4d provides: "To the extent the Carrier fails for any reason to make acceptable space available to the Government on a sailing of its ships on the route in an amount required for the Government to meet its requirement to ship cargo, the Carrier shall pay the Government for its default at the rate per MT of such deficit as stated in Annex A; provided, however, that the Carrier shall be excused from its commitment to furnish ship capability to the extent that its default is caused by force majeure including strikes."

THE ISSUES

In the order instituting this proceeding, we declined to consider the lawfulness of the proposed procurement program under sections 14 Fourth, 16 First, 17 and 18(b)(5) of the Act because the issues raised under those sections were premature and did not present us with justiciable controversies. Certain petitioners view our denial improper, at least insofar as sections 14 Fourth and 16 First of the Act are concerned.

The relevant portion of section 14 Fourth makes it unlawful for any common carrier by water to "make any unfair or unjustly discriminatory contract based on volume of freight offered . . ." Since no particular contract for any stated volume of cargo at a fixed rate had, as yet, been made, we declined to speculate on the validity under section 14 Fourth of contracts to be made in the future.

In a similar vein, section 16 First makes it unlawful for a common carrier by water to give any undue or unreasonable preference or advantage to any person, locality, or description of traffic or to subject any person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Here, pointing out that as yet no rates had been fixed under the proposed procurement program, we again declined to speculate as to validity of nonexistent rates under section 16 First.

It is argued, however, that what we were asked was "to determine the legality of the system, and not to measure the precise injury it inflicts". Or, as one petitioner would put it, "we are not, at the moment, complaining about rates but about a practice or device proposed by MSTS in its Request For Proposal No. 100." We are referred to the fact that neither section 14 Fourth nor section 16 First makes specific reference to rates. An analysis of their arguments will clearly reveal their legal insufficiency.

The basic premise upon which the entire argument is grounded is that the Department of Defense through MSTS proposes by the "device" of competitive bidding to reduce ocean transportation rates on military cargo by 25%. Thus, we are variously told:

> There is no question that the new competitive procurement device is intended to drive common carrier rates for MSTS cargoes to rock-bottom levels or perhaps below. The Department of Defense has boasted widely about the anticipated 25% reduction in ocean transportation costs.
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> * * *
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> The Department of Defense, recognizing the large volume of the MSTS cargoes and their importance to the carriers . . . expects a reduction in MSTS rates of at least 25% . . . It will accept and use the lowest rate, whether or not it is compensatory, and recognizes that this may well result in some lines going out of business.
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> * * *
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> . . . it must be remembered that the announced purpose of the competitive bidding system is to drive rates down as much as 25 or 30% in favor of the world's largest shipper. The disastrous effects of such a rate slash are evident.

The thread of the "25% reduction" runs throughout every argument of petitioners. This is their prime concern. It is also the key to their allegations of unlawfulness under the provisions of the Shipping Act cited to us. Thus, the "contract" is an unjust one under 14 Fourth because the reduction in rates would not be based" upon a recognition that MSTS cargoes, by their volume and their concentrated location, presented different shipping characteristics", but would be the product solely of competitive bidding. Whatever the validity of this latter assumption, it is itself precisely the reason why there can be as yet no determination made under section 14 Fourth. The section doesn't outlaw all contracts based on volume of freight offered; it proscribes

only those which are unfair or unjustly discriminatory. But how is such a contract to be unfair or unjustly discriminatory? Obviously, if the advantages offered under it are not based upon transportation factors which are altered by the "volume of freight offered". Here, the Cargo Commitment is sought if the offeror needs a fixed volume to provide his "best rate". By its very terms, the contract in question is geared to a rate. It is on the basis of rates that the contracts, if any, are to be awarded. To argue now that no specific contract, nor any specified volume, nor any fixed rate is needed to declare the Cargo Commitment unlawful is to ignore legal realities. Not even the most strained reading of section 14 Fourth can render unlawful the mere pro forma solicitation by a shipper, no matter how large, of contracts based on volume of freight and this is how petitioners would have us read the section.

It should be equally clear that any consideration of the "system" under section 16 First is just as premature. Again, the "preference" to MSTS is a reduced rate. It is nothing else. And yet again, not all preferences or prejudices are outlawed by that section but only those which are undue or unreasonable. How the undueness or unreasonableness of the rate preference is to be determined until the particular rate is in existence is never made clear nor indeed can it be at this time.

Certain petitioners point out that our order of July 19, 1966, failed to deal specifically with two issues raised in their petitions, i.e., that the competitive bidding system was unlawful (1) because it "violated the policies of the merchant marine statutes", and (2) the Commission "lacked statutory authorization" necessary for the establishment of preferential rates for government cargo.

While we did not read petitioners' references to "policy" as asserting a "violation", one is now specifically asserted. To the extent that this assertion is divorced from specific allegations of violation of particular substantive provisions of the statutes we are charged with administering, it should only be necessary to point out that expressions of policy are nothing more than the goals sought to be

achieved by Congress in the enactment of the particular substantive provisions of law which the statement accompanies. Standing alone a statement of policy grants no substantive power and prohibits no specific conduct. It is an aid in the construction of the substantive provisions of a statute, and it is not "violated" in the sense that those substantive provisions of a statute are violated. The "policies of the maritime statutes" as an aid in statutory construction, wherever relevant, are discussed in connection with the specific issues dealt with herein. However, some preliminary considerations are necessary to place the "policy" question in its proper perspective.

We are urged not to confuse our determination of the validity of RFP 100 under the Shipping Act with "such foreboding and seemingly omnipresent spectres as the Douglas Committee or a putative policy conflict with the Department of Defense". We need only say that petitioners' "trust" that we would not so confuse our deliberations and determinations was well placed. But we would that petitioners had rendered our task less difficult by restricting their arguments to us to particular provisions of the Shipping Act.[7/] In resolving the issues before us, we are told that it is mandatory that we consider the objective of promoting the American Merchant Marine. We are cited to the preamble to the Merchant Marine Act of 1920 (46 U.S.C. 861) which states that it is:

7/ Thus, we are offered arguments such as the program proposes a practice which is "revolutionary and improper deviation from Anglo-American transportation law"; that such a practice has never been sanctioned under the "venerable Interstate Commerce Act"; and that the practice calls for a "diabolical form of Russian roulette", but it is the application of the law only that is germane in our deliberations herein.

> . . . the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of . . . [a privately-owned American Merchant Marine] and insofar as it may not be inconsistent with the provisions of the Act, the United States Shipping Board [now, the Federal Maritime Commission] keep always in mind this purpose and object as the primary end to be obtained.

"Thus", it is argued, "the objective of promoting and maintaining an adequate and well balanced American Merchant Marine pervades the functions of the Commission under the regulatory provisions of the Shipping Act", and "In considering whether a practice is 'unfair' or 'detrimental to commerce', the Commission must properly be influenced in its determinations by the resulting effect that such a practice would have on the American Merchant Marine". There is very little in this latter conclusion with which we could disagree. However, a cautionary word or two is called for.

> Volumes have been written in the annals of Congress concerning our national shipping policy. The topic is traditionally a favorite one for patriotic addresses throughout the country, yet the interrelationships between the dual elements of our national shipping policy, both promotional and regulatory has never at any time been clearly articulated or well defined. It can only be deduced from a careful and painstaking study of our shipping laws and administrative practices which are neither consistent nor codified.[8/]

This national shipping policy which is to be ultimately deduced from a study of the shipping laws and past administrative practices, is a synthesis in which there is found "nothing inconsistent with regulatory

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8/ Report of the Antitrust Subcommittee of the Committee on the Judiciary, on the Ocean Freight Industry, House of Representatives, 82 Cong. 2d Sess. 1962, page 5 (Celler Report).

policy in U.S. promotional policy". (Celler Report 25 and 26). Indeed, "[t]he development and maintenance of a sound maritime industry require that the Federal Government carry out its dual responsibilities for regulation and promotion with equal vigor".[9/] The history of past organizational arrangements for carrying out these dual responsibilities had proved inadequate and the Government's experience under them culminated in Reorganization Plan No. 7. The purpose of the plan was to provide the most appropriate organizational framework for each of the functions - regulatory and promotional - thus:

> Regulation would be made the exclusive responsibility of a separate commission organized along the general lines of other regulatory agencies. On the other hand, non-regulatory functions, including the determination and award of subsidies and other promotional and operating activities would be concentrated in the head of the Department of Commerce . . . (House Doc. No. 187, 87th Cong. 1st Sess., 1961, page 2).

This Commission is, of course, the result of Reorganization Plan No. 7, and its responsibilities are exclusively regulatory. We may not "promote". Neither may we "regulate" without regard to the consequences of that regulation on our merchant marine, because the American merchant marine is itself a part of the foreign commerce of the United States and, as such, is entitled to the full protection of the Shipping Act. But the Act does not stop with the merchant marine, it extends its protections to shippers and "other persons" subject to its provisions. Just as we must "scrupulously insure that all carriers, regardless of flag, are accorded equal treatment under the laws we administer";[10/] we must be equally scrupulous lest our concern for our

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9/ Message of the President Transmitting Reorganization Plan No. 7 of 1961, House Doc. No. 187, 87th Cong., 1st Sess. 1961, page 2.

10/ Northern Pan-American Line A/S v. Moore McCormack Lines, Inc., 8 FMC 213 at 229 (1964).

merchant marine lead us to a construction of the Act which dilutes the protection afforded by it to shippers and "other persons". For, under the Act, such persons as shippers, forwarders, terminal operators and the like, are just as much a part of national maritime industry as are the ships which carry the cargo. The Act does not afford degrees of protection based upon differences of identity alone. It is based upon the assumption that adherence to the "rules of the game" will of itself aid in promoting our merchant marine and it is our sole responsibility to insure that these "rules" are observed. With this in mind, we turn to a consideration of the issues at hand.

DISCUSSION AND CONCLUSIONS

The Cargo Commitment Under Section 14b.

The petitioners urge that the only type contract lawful under the Shipping Act where a shipper commits himself to "give all or a fixed portion of his patronage" to a particular carrier is one approved by the Commission under section 14b of the Act.

> Indeed a dual rate contract is nothing but a cargo commitment by a shipper to a carrier or group of carriers. The heart of the definition [of a dual rate contract] is the commitment by the shipper of a fixed portion of patronage to the carrier. This is done by MSTS form 4280/2T. [The Cargo Commitment]. It follows that the form is a dual rate contract.

Thus, would petitioners bring the Cargo Commitment within the purview of section 14b which provides in relevant part:

> Notwithstanding any other provisions of this Act, on application the Federal Maritime Commission, shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract . . . which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers * * *.

It is by a literal reading and application of this language that petitioners conclude that the Cargo Commitment is a contract covered by section 14b. We may not, according to petitioners, resort to the legislative history because the language of the statute is clear and unequivocal on its face and the intent of Congress is relevant only to resolve ambiguities. We shall have more to say about this later, but for the moment, we shall restrict ourselves to a literal reading of the statute.

As petitioners point out, the critical language is "all or any fixed portion of his patronage". The Cargo Commitment deals with "minimum amounts". Under RFP 100, no Cargo Commitment would be for "all" of MSTS's "patronage" on a given route. Thus, we have the problem of equating "fixed portion" with "minimum amount". In our view, they are not synonymous.

The "patronage" referred to in section 14b is quite obviously the sum total of the particular merchant's foreign exports. Ideally, the dual rate contract commits all of these exports to move on conference vessels. The very purpose of the exclusive patronage or dual rate system is to tie to the conference as much of the total export movement in a given trade as possible. In this way, the conference counters competition from the so-called independent or nonconference operator.[11/] Where the contract calls for "all" of the merchant's patronage, no problem is presented. But what of the "fixed portion" referred to in 14b? How is this to be determined? Petitioners would equate "fixed portion" with "minimum amount". We don't find them synonymous, however.

A portion is "an allotted part" or "a part of the whole".[12/] The whole is, of course, everything exported by the merchant in the trade and the "portion" to be "fixed" is a part of that whole. Let us see

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11/ See Federal Maritime Board v. Isbrandtsen Co., 354 U.S. 481 (1958).

12/ Webster's New Collegiate Dictionary, page 658.

what happens if we accept petitioners' reading of "fixed portion" as "minimum amount". A merchant agrees to commit to a carrier 1000 tons of cargo under a contract running for a year. Clearly, this is some "portion" of his patronage, but is it "fixed" within the meaning of the statute? Obviously not. If the merchant exports a total of 2000 tons over the duration of the contract, the "portion" represented by the 1000 tons is 50% or one-half of his patronage but if the merchant exports 10,000 tons, the "portion" represented by the 1000 tons committed under the contract is only 10% or one-tenth of the whole. Clearly, the 1000 tons cannot represent any "fixed portion" of the merchant's patronage. However, if the same merchant agrees to give the carrier 50% (one-half) or 10% (one-tenth) of his patronage, the "portion" remains "fixed" whatever his total exports may be for the period of the contract. Thus, it is clear that "fixed portion" does not equate with a specified or "minimum amount" stated in terms of tons, rather as used in section 14b "fixed portion" is synonymous with a percentage or an invariable part of the whole. A consideration of section 14 in its entirety buttresses this conclusion.

Section 14 Fourth makes it unlawful for a common carrier by water to "make any unfair or unjustly discriminatory contract based on volume of freight offered. . ." If every contract calling for a "minimum amount" of volume is a contract for a "fixed portion" and included within 14b, what is the contract which may be made under 14 Fourth?[13/] Are we now to assume that contracts originally unlawful

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13/ That the Cargo Commitment is a volume contract would seem beyond dispute. Thus, the Cargo Commitment will be awarded where the contracting officer finds it to be in the best interest to commit the Government "to ship a minimum volume of cargo for a specified number of sailings on a particular route." Thus, if a carrier can offer his best rate if he is guaranteed say a minimum of 500 tons for each of his sailings, he would seek a Cargo Commitment. Here there is no difficulty in equating minimum volume and minimum amount. Thus, contracts calling for a stated volume and contracts calling for a stated amount are but different ways of stating the same thing.

only if "unfair or unjustly discriminatory" must now, because of 14b, be filed for approval and contain provisions concerning such things as the prompt release of the shipper; or who has the legal right to select the carrier with whom the goods are shipped; or diversion of goods from natural routings? And all this without any reference to 14 Fourth in the newly enacted 14b. This is, of course, the way petitioners would have us read the section. If Congress had intended to alter the status of contracts based on volume of freight offered, they certainly would have made such an intention clear. Amendments to statutes are not to be implied. Wherever possible, a statute is to be construed so as to preserve intact all its provisions. If section 14b is read as petitioners urge, then section 14 Fourth would at the very least take on a meaning different than it originally had. That petitioners misread section 14b becomes even clearer when resort is had to the background and legislative history of that section.

In 1958, the Supreme Court in Federal Maritime Board v. Isbrandtsen Co., 354 U.S. 481, struck down the so-called exclusive patronage dual rate contract of the Japan-Atlantic and Gulf Freight Conference as unlawful under section 14 Third of the Shipping Act.[14/] In Isbrandtsen, supra, the Board had argued that the contracts in question had to be lawful because the legislative history of the Shipping Act clearly demonstrated that Congress was well aware that the use of such contracts as a tying device was widespread in the foreign commerce of the United States and it had not outlawed such contracts even though it had specifically outlawed other tying devices such as the deferred rebate prohibited in section 14 Second. In rejecting this contention, the Court pointed out that the contracts "recognized" by Congress had been described as follows:

14/ Section 14 Third makes it unlawful for a carrier to "Retaliate against any shipper by refusing or threatening to refuse, space accommodations when such are available or to resort to other discriminating or unfair methods because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason".

> Such contracts are made for the account of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers, at regular intervals and the shipper agrees to confine all shipments to conference steamers, and to announce the quantity shipped in ample time to allow for the proper supply of tonnage.
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> The rates are less than those specified in the regular tariff, but the lines generally pursue a policy of giving the small shipper the same contract rates as the large shippers, i. e. are willing to contract with all shippers on the same terms.

In distinguishing these contracts from the exclusive patronage dual rate contract then before it, the Court said:

> These contracts were very similar to ordinary requirements contracts. They obligated all members of the Conference to furnish steamers at regular intervals and at rates effective for a reasonably long period sometimes a year. The shipper was thus assured of the stability of service and rates which were of paramount importance to him. Moreover, a breach of the contract subjected the shipper to ordinary damages.
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> By contrast, the dual rate contracts here require the carriers to carry the shipper's cargo only 'so far as their regular services are available'; rates are 'subject to reasonable increase' within two months plus the unexpired portion of the month after notice of the increase is given'; [e]ach Member of the Conference is responsible for its own part only in this Agreement'; the agreement is terminable by either party on three months' notice; and for a breach, the shipper shall pay as liquidated damages to the Carriers fifty (50) percentum of the amount of freight which the shipper would have said had such shipment been made in a vessel of the Carriers at the Contract

rate currently in effect.' Until payment of the liquidated damages the shipper is denied the reduced rate, and if he violates the agreement more than once in 12 months, he suffers cancellation of the agreement and denial of another until all liquidated damages have been paid in full.

Almost immediately after the Supreme Court's decision in Isbrandtsen, the Congress moved, through "moratorium" or "interim" legislation, to preserve the legality of the dual rate system until such time as it could enact permanent legislation.[15/] In 1961, Congress enacted P.L. 87-346 (75 Stat. 762) which, among other things, added section 14b to the Shipping Act. The connection between Isbrandtsen and P.L. 87-346 is too well known to warrant detailing here.[16/] A simple reading of the provisions of 14b makes it patently clear the contract which was to be legal under the Shipping Act "notwithstanding any other provisions of [the] Act,"[17/] was the dual rate contract before the Supreme Court in Isbrandtsen. But what of that contract which the Supreme Court had found to be something distinct and different from the dual rate contract - the contract of which Congress expressly stated its awareness of but did not outlaw - the contract which the Supreme Court found similar to "ordinary requirements contracts". Such contracts had, since 1916, been lawful under section 14 Fourth so long as they were not unfair or unjustly discriminatory. We will not now read section 14b as altering the long-standing status of these contracts.

15/ P.L. 85-626, 85th Cong., S. 2916 (August 12, 1958) amended by P.L. 86-542, 86th Cong. HR 10840 (June 29, 1960), further amended by P.L. 87-75, 87th Cong. 32154 (June 30, 1961).

16/ See, however, House Report No. 498, 87th Cong. 1st Sess., 1961, pages 3-7 and Senate Report No. 842, 87th Cong. 1st Sess., 1961, pages 1-11.

17/ For the full text of section 14b, see appendix.

Just as it is clear that section 14b deals with the dual rate or exclusive patronage contract, it would seem equally clear that the Cargo Commitment is just that kind of contract which the Supreme Court found similar to an ordinary requirements contract. Thus, it obligates the carrier to furnish steamers (a specified amount of space) at regular intervals (by sailing) and at rates effective for a reasonably long period, sometimes a year (the specified period in the Cargo Commitment is one year). We conclude that the Cargo Commitment is not an exclusive patronage or dual rate contract the use of which is to be permitted subject to the provisions of section 14b but is a contract "based on volume of freight offered" within the meaning of section 14 Fourth. Whether a particular Cargo Commitment is unfair or unjustly discriminatory and thus unlawful under 14 Fourth is, as we have already pointed out, dependent upon such things as the particular amount of cargo committed and the specific rate fixed under it.

What we have thus far said is, of course, in no way concerned with any special status of the Government as a shipper under the Act and would apply to all shippers. Petitioners, however, make much of the absence from the Shipping Act of any express provision in the Act for reduced rates to the Government. Although, petitioners' contentions are made in the context of their arguments under section 14b, they entail much more as we read them. Petitioners point out that in 1961, the Comptroller General, in letters to the House-Merchant Marine and Fisheries Committee and the Senate Committee on Commerce, urged inclusion in the legislation enacting 14b of a provision similar to

section 6 of the Intercoastal Shipping Act, 1933.[18/] At one point, the Senate Committee acceded to the request and added the reduced rate provision, but this was deleted without explanation from the final act as passed (See Index to the Legislative History Senate Doc. No. 100, 87th Cong. 1st Sess. page 218).

Petitioners' argument, reduced to its essentials, is: no exemption, no reduced rates to the Government. In his letters, the Comptroller General cited United States v. Associated Air Transport, 275 F. 2d 837 (C. A. 5, 1950); and Slick Airways v. United States, 292 F. 2d 515 (Ct. Cl. 1951), and it is upon these cases that petitioners rely.

The Slick and Associated cases both involved the proper charges to be imposed for services already performed. The issue in both cases was the applicability of the carriers' already published and filed tariff rates to the particular services rendered. In each case, the Court's decision rested upon the simple proposition that the filed tariff rate alone governed the dispute. Thus, in the Associated case, the Court refused to consider "contracts or agreements or understandings or promises" which had not been filed with the Civil Aeronautics Board declaring "The tariffs are both conclusive and exclusive". (275 F. 2d at 827). Again in Slick, the Court of Claims held that the rate specified in a contract was superseded by a new rate when the new rate was properly filed with the Civil Aeronautics Board, stating, "The tariff must control in the event of an inconsistency between it and the contract

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18/ Actually, the requested provision would have added to the present tariff filing requirements now in section 18(b) a proviso to appear in subsection (3) thereof stating:

> Provided that nothing in this act shall prevent the carriage, storage or handling of property free or at reduced rates, for the United States, state or municipal governments, or for charitable purposes.

of carriage". (292 F.2d at 519). Neither case denied the right of the Government to reduced rate transportation when the reduced rate was properly filed and a part of the published tariff of the carrier, thus:

> . . . under the Civil Aeronautics Act, the Government had the right to reduced rates only pursuant to tariffs lawfully published and filed by a carrier under section 403 of the Act. Slick, supra at 518.

Here than can be no question of a conflict between the tariff rate and actual rate paid by the Government. Under RFP 100 itself, all rates agreed upon are to be published and filed with the Commission under section 18(b) of the Act. The authorities of the petitioners are not relevant to the issue here.19/

Petitioners' contentions are based upon the assumption that unless the Government is some type of preferred status shipper under the Act, it is a "shipper" within the meaning of section 14b and thus the Cargo Commitment is a dual rate contract. The legislative history makes it clear to us, that shipper and consignee as used in section 14b have a distinct and somewhat limited frame of reference.

In the so-called interim or moratorium legislation by which Congress preserved the legality of the dual rate system until the

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19/ At common law, the sovereign was, of course, entitled to reduced rate transportation, and any statute which would tend to restrain or diminish the sovereign's powers, rights or interest is not binding unless the sovereign is named therein. Emergency Fleet Corporation v. Western Union, 275 U.S. 415 (1927). Thus, it would seem that any denial of reduced rate transportation to the Government would have to be based on express statutory language. See also Guarantee Co. v. Title Guaranty Co., 224 U.S. 152 (1912); United States v. California, 297 U.S. 175 (1936); Guaranty Trust Co. v. U.S., 304 U.S. 126 (1938): Public Utilities Commission of California v. U.S., 335 U.S. 543 (1958); and Paul v. U.S., 371 U.S. 245 (1963).

enactment of P.L. 87-346, (see note 15, supra), the term "merchant" is used throughout.[20] Even the most cursory examination of section 14b itself reveals the "commercial" nature of the problems dealt with therein. For example, section 14b(2) provides that a rate, insofar as it is under the control of the carrier must remain in effect for at least 90 days. This was the period uniformly urged by exporters as necessary to their doing business abroad. Section 14b(3) deals with the legal right of the contract shipper to select the vessel. Here again, sale and purchase are involved, and the provision relieves the shipper from liability under the dual rate contract when the terms of sale vest the right to select the vessel in the purchaser or consignee.

Hearing Counsel, MSTS, and intervenor Sapphire Steamship Lines, Inc., all urge that Congress could not have intended that so large a part of the total carriage of the American flag lines[21] be the subject of section 14b without extensive hearings on the matter. These parties were able to unearth only a single reference to military cargo - a letter from the Secretary of the Navy in which he declined to comment on a predecessor bill of P.L. 87-346 because it "would have no effect on Department of Defense shipments and appears to be of primary importance to the Department of Commerce." [22]

20/ Indeed in our original rules dealing with the dual rate system under 14b, we expressed our understanding of the intent of Congress when we termed the contract provided for a "Uniform Merchants Rate Agreement", and used the term "merchant" throughout. In addition, the uniform agreement expressly provided in Article 7(b) that "goods not intended for commercial or industrial use" shipped by governments or charitable institutions could take rates "lower than contract rates" and not constitute a violation of the agreement so long as those rates were filed with the Commission.

21/ Sapphire points out MSTS cargo amounted to $282.6 million out of a total of $646.8 million of earnings for the U.S. flag merchant marine in 1964. See the Impact of Government Generated Cargo on the U.S. Flag Foreign Trade Fleet for Calendar Year 1964, Office of Program Planning Maritime Administration, Department of Commerce, October 1965, published by the Joint Economic Committee, 89th Cong. 1st Sess. p. 6.

22/ On the other hand, an appendix to the Opening Brief of Hearing Counsel lists references to the legislative history too numerous to mention here, all demonstrating the "commercial" nature of the problems and solutions under 14b.

Moreover, that the industry has long viewed the dual rate system as a purely "commercial" tying device would appear from the historical treatment of "project rates". The Report of the Investigating Officer in Fact Finding Investigation No. 8 - Project Rates and Related Practices, (May 24, 1965) shows that presently and over the past there have been innumerable contracts between ocean common carriers and shippers for the transportation, at discount rates, of volume movements of cargoes that are not for resale.[23/] The Investigating Officer, at page 14 of his report, stated:

> One test universally applied is the requirement that the commodities shipped under project rates may not be for resale by the shipper, consignee, or any one else. The cargoes do not enter the "stream of commerce". Shippers and carriers alike feel that this is an essential characteristic of project rates and that it prevents unfair competition and unjustly discriminatory or preferential treatment between shippers.

But if petitioners' construction of section 14b is now adopted, it would seem obvious that project rate agreements as they have existed historically would be illegal under that section.[24/] Indeed, petitioners' sole reply to all arguments of past practice is that all of this was before the law was changed. Petitioners would have us conclude that Congress by preserving the legality of one traditional and historic practice, intended by implication to outlaw still another historic and, it would appear, equally venerable practice. We will not attribute such an intent to Congress nor do we feel that even petitioners really desire such a conclusion.

23/ As MSTS points out, the military cargoes shipped under Cargo Commitments would not be for resale by anyone.

24/ They normally contain few or none of the required provisions under section 14b and it does not appear that they could and still accomplish the desired result.

On the basis of the above we conclude that the Cargo Commitment proposed by MSTS is not a contract within the meaning of section 14b, approval of which by the Commission is required before its use may be permitted in the foreign commerce of the United States. Insofar as the petitions herein seek an order declaring the Cargo Commitment a contract within the meaning of section 14b they are denied.

Competitive Bidding Under The First Paragraph of Section 16

Petitioners would also have us declare that the requirement that bids in response to RFP 100 must be submitted under seal constitutes the use by a shipper of an unjust device or means for obtaining or attempting to obtain transportation at less than the regular rates and charges which would otherwise be applicable on the lines of petitioners within the meaning of the first paragraph of section 16,[25/] which provides:

> That it shall be unawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent or employee thereof, knowingly and willfully, directly or indirectly by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

Petitioners begin with the premise that this provision is designed to protect carriers from the loss of a "rightful source of revenue" through shipper "coercion." They point out that under RFP 100 "none of the lines will know the rates which its competitor is bidding." The procedure is, the petitioners argue, "essentially the same as requiring

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25/ Petitioners seek the same declaration under section 16 Second which makes it unlawful for a carrier to allow a shipper to use such a device. Resolution of the issue under the first paragraph of section 16 will dispose of the issue under 16 Second.

of each line that it submit a secret promise of a rebate." Thus, petitioners urge "a 'device or means' which accomplishes a rate departure through the use of concealment is automatically the 'unfair device or means' contemplated by the statute".

It is difficult to conceive of a greater misapplication of the first paragraph of section 16. Under the terms of RFP 100 the rates established must be filed with the Commission. They are then of course available to the public, both shipper and carrier alike. Admittedly, no one will know the rates before they are published, but it must be asked how else can there be competition among the bidders? It is precisely because "none of the lines will know the rates which its competitor is bidding" that the proposed program achieves its stated purpose of placing the carriage of military cargoes on a competitive basis. 26/ It is easy to see that by reading section 16 first paragraph as affording carriers a right to know what their competitors are willing to offer by way of rates, petitioners have changed the provision from one designed to eliminate certain competitive practices which were deemed unfair or unjust into one that would eliminate virtually all competition.

Certainly it is true that carriers may restrict competition among themselves under the Shipping Act, but they may do so only under the terms and conditions of section 15 of the Act. There is nothing in the Act which requires them to restrict competition just as there is nothing in the Act which gives an individual carrier the right to know what rate a competitor may be willing to negotiate with a shipper in order to get that shipper's patronage. All that the Act requires is that when a carrier and a shipper have agreed on a rate it must be published in its tariff, filed with the Commission and made available to all in a way which is not unjustly discriminatory or unduly prejudicial, etc.

26/ As petitioners themselves have pointed out we are not here concerned with whether the new program with its insistence on competition is "good or bad" but only its lawfulness under the Shipping Act.

By the same token there is nothing in the Act which requires a shipper to deal with any anticompetitive combination of carriers established under section 15. The Act leaves the shipper free to seek the best rate he can get subject only to the Act's prohibitions against preference, prejudice and discrimination and further provided that the means employed by the shipper is not unjust or unfair within the meaning of section 16.

The basic purpose of section 16 is to insure adherence by a carrier to his publicly announced rates, not to foreclose any change in those rates at the behest of an individual shipper. Thus, the first paragraph of section 16 makes it unlawful for a shipper to submit a false classification of the goods contained, for example, in a sealed carton in order to bring his shipment within a commodity class taking a lower rate under the tariff thereby "depriving the carrier of a rightful source of revenue." It is equally unlawful for the shipper to submit a false statement of weight. The purpose behind these prohibitions as well as those of section 16 Second is not far to seek. It was stated by Congress:

> Section 16 of the Shipping Act of 1916, as amended, among other things, provides that it shall be unlawful for any common carrier by water, or other person subject to that act, to allow the transportation of property at less than the regular rates then in force by the common carrier by means of false billing or other misclassification of freight, false claims, etc. Thus it will be seen, that while the carrier is prohibited from allowing favoritism or partiality as among competing shippers, the carrier itself is afforded no protection against the practice of an unscrupulous shipper, forwarder, broker, or other delivering goods to the carrier for transportation, in deliberately misclassifying packages of freight for the purpose of obtaining a lower transportation rate at the expense of the carrier.

> The Senate measure, therefore, strengthens this portion of the Shipping Act of 1916, and goes further in providing that such a practice shall neither be engaged in by a common carrier by water nor by any shipper, consignor, consignees, forwarder, broker, or other person, or any officer, agent, or employee thereof; and provides a penalty for violations of from $1,000 to $3,000, thereby effectually removing the means left open to dishonest shippers or consignees whereby they may take advantage not only of their competitors who do not indulge in the practice of false billing and misclassification in order to receive a lower transportation rate for their freight, but also of the carrier itself by depriving the carrier of a rightful source of revenue.

The section clearly contemplates, not that the tariff rate will not be changed, but rather that the tariff rate will ostensibly remain in effect while some other rate is actually paid by the shipper. Thus it is unlawful to misclassify an article to obtain a lower rate;[27/] to rebate a portion of the freight rate to a particular shipper;[28/] to withhold information from the carrier essential to a determination of the proper rate,[29/] or to seek a lower rate or rebate by false billing.[30/] In all of these instances the tariff rate remained unchanged even after the unlawful practice was employed. Indeed it was essential to the particular scheme that the tariff rate not be changed. Under RFP 100 the rates will, as we have already pointed out, be filed with the Commission, it is therefore, impossible for the shipper to obtain transportation at less than the rates otherwise applicable i.e. the rates that the carrier is bound to charge under section 18(b)(3).

27/ Royal Netherlands S.S. Co. v. FMB, 304 F.2d 928 (C.A.D.C., 1962).

28/ U.S. v. Peninsular & Occidental S.S.Co., 298 F. Supp. 957 (S.D.N.Y. 1962).

29/ Prince Line Ltd. v. American Paper Exports Inc., 55 F. 2d 1053 (C.A. 2, 1932).

30/ Hohenberg Bros. Company v. FMC, 316 F.2d 381 (C.A.D.C. 1963).

Moreover, no straining of the principle of ejusdem generis can equate the competitive bidding called for in RFP 100 with the type of "unjust or unfair device or means" contemplated in the first paragraph of section 16. On the basis of the foregoing we conclude that the competitive bidding embodied in RFP 100 is not an unjust or unfair device or means within the meaning of the first paragraph of section 16 [31] and to the extent the petitions here seek an order declaring RFP 100 unlawful thereunder they are denied.

Competitive Bidding Under the Pacific Westbound and AGAFBO Agreements

Certain petitioners[32] urge that their participation in the proposed competitive procurement program would place them in violation of their obligations under Agreement No. 57 which establishes the Pacific Westbound Conference. Article 1 of Agreement No. 57 requires that "[a]ll freight or other charges for the transportation of cargo [in the trade] shall be charged and collected [by the members] strictly in accordance with the Tariff." Item No. 1 of Local Freight Tariff No. 1-Y-FMC-1, the tariff which these petitioners are bound to observe under the agreement, provides that "Member lines are permitted to negotiate special rates or charters with the Military Sea Transportation Service." Petitioners argue, however, that this provision "cannot be distorted to authorize the type of competitive dealings with the military called for in the MSTS invitation for competitive proposals."

It is difficult to determine just what petitioners seek from us under this argument for they go on to say:

> These lines recognize that this issue is necessarily subsidiary to the statutory issues. We would assume that the conference would revise the relevant tariff rule to authorize response to RFP 100 should this Commission conclude that the practice is not

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31/ It is therefore lawful under section 16 Second as well.

32/ American Mail Line, Ltd., American President Lines, Ltd., Pacific Far East Line, Inc., States Steamship Company and Waterman Steamship Corporation.

> violative of the Shipping Act. Alternatively, if the Commission were to conclude that the practice is violative of the Shipping Act, the meaning of the tariff provision would be moot.

At first blush this would appear a simple straightforward statement. Under it, should we, as we have, find RFP 100 lawful the conference at petitioners' request would simply substitute some appropriate language in the tariff rule to render clear the U.S.-flag lines freedom to respond to RFP 100. The argument, however, does not stop here. In arguing that "negotiate" could not be read to include "competitive bidding" petitioners state that the conference did not intend to sanction "the advent of a competitive innovation such as RFP 100, with its highly disruptive potential in the trade." Indeed, petitioners argue that it is highly unreasonable to conclude that the conference intended any such thing. Moreover, petitioners indicate that their assumption that the conference will amend the rule is placed on shaky ground by our "bifurcated decision" on their petition for declaratory order. Thus, their assumption is stated yet another way:

> If competitive bidding for MSTS cargo were finally held lawful we should suppose it likely that the PWC tariff rule would be amended to permit its U.S.-flag member lines to compete. We have, however, no idea what its membership would conclude if competitive bidding for MSTS cargo were held lawful with respect to three arguments with decision deferred to another proceeding upon another three.

Whatever petitioners' precise position may be the implications involved are quite clear: That the foreign flag segment of the conference may restrict or refuse to sanction a particular method by which its "U.S.-flag member lines" may deal with the United States Government on the terms under which cargo reserved by law to those U.S.-flag lines is to be carried. We think it patently clear that any agreement or any rule promulgated under it which could properly be construed to achieve such a result would be contrary to the public interest within the meaning of

section 15. It would seem equally clear that under such circumstances we should have to withdraw our approval of the agreement. In all fairness, however, it should be remembered that no amendment has yet been sought. We assume that these petitioners will now seek prompt amendment of Item No. 1.[33/]

The Atlantic & Gulf American Flag Berth Operators[34/] intervened in this proceeding apparently for the sole purpose of asserting that we may not disapprove, cancel or modify the AGAFBO agreement in this proceeding, i. e. a full evidentiary hearing would be necessary before any such action could be taken. We say this is apparently their only purpose because they do not stop here, or at least it would seem that they do not. For while they admit that Article 1 of the agreement is permissive and merely provides that the member lines "may" negotiate rates with MSTS, they further point to Article 2(a) which provides that all actions taken under the agreement "shall be binding on all parties" thereto. As these petitioners themselves admit the rates negotiated with MSTS are embodied in contracts between MSTS and the individual operators, the fact that these contracts have not as yet been canceled by MSTS although they provide for cancellation on sixty days' notice by either party is we think irrelevant in this proceeding. The outstanding contracts certainly do not prohibit agreement upon new contracts and we can only assume that the present contracts will be canceled before or at the time of entry into the agreements. In any event there is nothing in Agreement 8086 as we read it to prohibit the parties thereto

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33/ This is of course not to be taken as a determination on our part that the construction placed upon Item No. 1 by petitioners is the proper one. Since RFP 100 does not as yet extend to the trade covered by the PWC, petitioners would have ample time to obtain an amendment.

34/ Established pursuant to Agreement FMC No. 8086.

from responding to RFP 100 nor does it appear that they themselves view it as a bar thereto. Since we find it unnecessary to take any action with respect to Agreement 8086, the issue of what type of proceeding is necessary before such action may be taken is moot.

For the above stated reasons, the petitions before us insofar as they request that we issue an order declaring any of the petitioners herein prohibited from responding to RFP 100 because of any agreement approved under section 15 of the Act, are denied.

Therefore, for the reasons stated herein we find that RFP 100 is not unlawful under section 14b or the first paragraph of section 16; and further that no agreement approved under section 15 and cited to us herein, would prohibit any of the petitioners from responding to RFP 100 in its present form and coverage.

Accordingly the petitions for declaratory order are denied.

Commissioner Day concurs in the result and may issue his separate concurring opinion at a subsequent date.

/s/ Thomas Lisi
Secretary

(SEAL)

APPENDIX

SEC. 14b. Notwithstanding any other provisions of this Act, on application the Federal Maritime Commission (hereinafter "Commission") shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract, amendment, or modification thereof, which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers unless the Commission finds that the contract, amendment, or modification thereof will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and provided the contract, amendment, or modification thereof, expressly (1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice; (2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days; (3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: Provided, however, That it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract; (4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where

direct carriage is available; (5) limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law: Provided, however, That the contract may specify that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling; (6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice; (7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates; (8) excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots: Provided, however, That upon finding that economic factors so warrant, the Commission may exclude from the contract any commodity subject to the foregoing exception; and (9) contains such other provisions not inconsistent herewith as the Commission shall require or permit. The Commission shall withdraw permission which it has granted under the authority contained in this section for the use of any contract if it finds, after notice and hearing, that the use of such contract is detrimental to the commerce of the United States or contrary to the public interest, or is unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. The carrier or conference of carriers may on ninety days' notice terminate without penalty the contract rate system herein authorized, in whole or with respect to any commodity: Provided, however, That after such termination the carrier or conference of carriers may not reinstitute such contract rate system or part thereof so terminated without prior permission by the Commission in accordance with the provisions of this section.

Any contract, amendment, or modification of any contract not permitted by the Commission shall be unlawful, and contracts, amendments, and modifications shall be lawful only when and as long as permitted by the Commission; before permission is granted or after permission is withdrawn it shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract, amendment, or modification. As used in this section, the term "contract shipper" means a person other than a carrier or conference of carriers who is a party to a contract the use of which may be permitted under this section.

November 1, 1966

JAMES V. DAY, CONCURRING -

I concur that RFP 100, containing the terms and conditions under which the Department of Defense proposed to extend its competitive procurement program to ocean transportation, is not unlawful under section 14b or the first paragraph of section 16; and further that no agreement approved under section 15 and cited in this proceeding, would prohibit any of the petitioners from responding to RFP 100 in the form and coverage described in this record. I would emphasize, however, that in our concern with shippers (as well as "other persons") covered by the shipping laws which we administer we must also maintain a vigilant watch over the consequences of regulatory determinations on our carriers. As part of our commerce the carriers are entitled to the full protection of the Shipping Act. In this regard with the establishment of competitive bidding for low cost service to the Government we should be constantly mindful of the longer run, as well as the immediate results. Further, in future determinations of the reasonableness of rates filed with us relative to the competitive bidding procedures as they may be developed, it is pertinent to weight the effect on U.S. flag carriers not contracting for cargo as well as to consider the effect on the financial prospects of those carriers so contracting.

In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN EXPORT ISBRANDTSEN LINES, INC., AMERICAN MAIL LINE, LTD., AMERICAN PRESIDENT LINES, LTD., BLOOMFIELD STEAMSHIP COMPANY, GLOBAL BULK TRANSPORT INCORPORATED, ISTHMIAN LINES, INC., PACIFIC FAR EAST LINE, INC., STATES MARINE LINES, INC., STATES STEAMSHIP COMPANY, WATERMAN STEAMSHIP CORPORATION and ATLANTIC & GULF AMERICAN FLAG BERTH OPERATORS,	)	
Petitioners,	)	No. 20414
v.	)	
THE FEDERAL MARITIME COMMISSION, THE UNITED STATES OF AMERICA,	)	
Respondents.	)	

STIPULATION

Petitioners and respondents, through their respective counsel, hereby stipulate and agree as follows:

I. Questions Presented.

The questions presented are:

(1) Whether the contracts for ocean carriage of military cargo required by Request for Proposals No. 100 of the Military Sea Transportation Service are dual rate contracts within the meaning of Section 14(b) of the Shipping Act, 1916.

(2) Whether the bidding requirements established by Request for Proposals No. 100 are unjust or unfair devices or means within the meaning of the first paragraph of Section 16 of the Shipping Act, 1916.

II. Briefs and Designations of Record.

The parties agree that briefs may be initially filed in typewritten form. Designations of portions of the record to be printed in the Joint Appendix shall be made by the parties within five days of the filing of

their respective briefs. Petitioners shall prepare and file a Joint Appendix with the Court within ten days of the date for filing the Reply Brief. If it is possible for the parties to agree on the contents of the Joint Appendix prior to the submission of any brief, petitioners will prepare and file the Joint Appendix with their Opening Brief.

Respectfully submitted,

[Signatures Omitted]

[Filed October 18, 1966]

PREHEARING ORDER

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

The briefs of the parties shall be filed in printed form not later than the date on which petitioners' reply brief is due to be filed.

[Filed October 18, 1966]

ORDER

It appearing that counsel for Sapphire Steamship Lines, Inc., has filed a notice of intention to intervene in this petition for review of an order of the Federal Maritime Commission herein and that no response has been filed by the parties with respect thereto, it is

ORDERED that the Clerk shall make an appropriate entry in the docket records of his office listing said party as an intervenor in this case.

BRIEF FOR PETITIONERS

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,414

AMERICAN EXPORT ISBRANDTSEN LINES, INC., ET AL., *Petitioners,*

v.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

ON PETITION FOR REVIEW OF FEDERAL MARITIME COMMISSION DECISION.

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Questions Presented

1. Are the contracts for ocean carriage of military cargo required by Request for Proposals No. 100 of the Military Sea Transportation Service dual rate contracts within the meaning of section 14b of the Shipping Act, 1916?

2. Are the bidding requirements established by Request for Proposals No. 100 unjust or unfair devices or means within the meaning of the first paragraph of section 16 of the Shipping Act, 1916?

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* Cases and authorities chiefly relied upon are marked by asterisks.

STATUTES

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* Cases and authorities chiefly relied upon are marked by asterisks.

OTHER AUTHORITIES

APPENDIX

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* Cases and authorities chiefly relied upon are marked by asterisks.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,414

AMERICAN EXPORT ISBRANDTSEN LINES, INC., et al.,
Petitioners,

against

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR REVIEW OF FEDERAL MARITIME COMMISSION DECISION

BRIEF FOR PETITIONERS

Jurisdictional Statement

This petition is to review a report and final order of the Federal Maritime Commission (hereinafter referred to as the "Commission"), dated August 9, 1966, in a proceeding for a declaratory order under sections 14b and 16 of the Shipping Act of September 7, 1966, c. 451, 39 Stat. 728, as amended, 46 U.S.C. §§ 813a and 815, which is entitled *In the Matter of Carriage of Military Cargo*, Federal Maritime Commission Docket No. 66-42, and by which Petitioners are aggrieved and their interests adversely affected.

Review is sought by this petition and the jurisdiction of this Court is based upon the provisions of the Act of December 29, 1950, c. 1189, 64 Stat. 1129, as amended, 5 U.S.C. §§ 1031-1042. Venue in this Court is likewise based

upon the Act of December 29, 1950, c. 1189, 64 Stat. 1130, as amended, 5 U.S.C. § 1033.*

Pleadings showing the existence of jurisdiction are found in the petition to review filed with this Court.**

Statement of Facts

On April 4, 1966, the Military Sea Transportation Service (hereinafter "MSTS"), Department of the Navy, announced its intention to abandon the procedures for the procurement of ocean transportation of military cargoes which had prevailed for in excess of fifteen years. Negotiation of transportation rates by MSTS and by associations of American-flag ocean common carriers, established at the request of the military, organized in conformity with section 15 of the Shipping Act, 46 U.S.C. § 814, and operating under the supervision of the Federal Maritime Commission, was to be jettisoned summarily. MSTS proposed to procure ocean transportation by a kind of competitive bidding among individual American-flag berth carriers eligible to carry Department of Defense cargo under the Cargo Preference Act, 1904, 10 U.S.C. § 2631.

On June 15, 1966, MSTS made public its "Request for Proposals No. 100 (Ocean Transportation-Common Carriage)" (hereinafter "RFP 100"), an invitation for competitive proposals for the movement of military cargoes between East Coast, Gulf Coast, and Great Lake ports of the United States, on the one hand, and the United Kingdom and Bordeaux-Hamburg range of ports, on the other hand (JA 10). Simultaneously with the publication

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* The judicial Review Act of December 29, 1950 was repealed by section 8(a) of the Act of September 6, 1966, Pub. L. 89-554, 89th Cong., 80 Stat. 632, 656, enacted after the petition for review was filed with this Court. Section 4(c) of the 1966 Act, 80 Stat. 621-625, amended title 28 U. S. C. to incorporate the provisions of the 1950 Act as chapter 158, sections 2341 through 2352. The Judicial Review Act of August 28, 1958, Pub. L. 85-791, 85th Cong., 72 Stat. 941, was not affected by the 1966 Act.

** References to the Appendix and Joint Appendix appear herein as "(A)" and "(JA)" respectively.

of RFP 100, MSTS announced that additional invitations, containing comparable terms and procedures, would be issued for other trade areas at stated intervals in the near future.

The various Petitioners, singly and jointly, filed successive petitions with the Federal Maritime Commission between June 27, 1966 and July 11, 1966 challenging the legality of RFP 100 and asserting that the procurement procedures proposed to be instituted thereunder would result in unfair and unjustly discriminatory contracts based on the volume of freight, in violation of section 14 Fourth of the Shipping Act, 46 U.S.C. § 812; would represent a dual rate contract, an arrangement which must be approved by the Federal Maritime Commission under section 14b of the Act, 46 U.S.C. § 813a, prior to utilization in the foreign commerce of the United States; would constitute an unjust or unfair device or means for obtaining transportation at reduced rates, practices prohibited by the first paragraph of section 16 and by section 16 Second of the Act, 46 U.S.C. § 815; would result in an undue or unreasonable preference prohibited by section 16 First of the Act, 46 U.S.C. § 815; and would result in unjustly discriminatory rates in violation of section 17 of the Act, 46 U.S.C. § 816 and rates so unreasonably low as to be detrimental to the Commerce of the United States and subject to disapproval under section 18(b)(5) of the Act, 46 U.S.C. § 817. By way of relief, the several petitions requested the Commission to invalidate the procurement procedures proposed under RFP 100 because of their apparent conflict with the indicated provisions of the Shipping Act.

On July 19, 1966, the Commission issued the order of investigation in the proceedings below, specifically limiting the scope of the inquiry to the issues raised by the Petitioners under section 14b, section 15, the first paragraph of section 16, and section 16 Second of the Shipping Act (JA 1). In the same order, the Commission denied the petitions as to the further statutory issues raised therein on the ground that those questions were premature and

did not raise justiciable issues, and that the additional questions could only be resolved after MSTS and the carriers had entered into the arrangements contemplated by RFP 100 (JA 6). The Commission ordered expedited briefing and oral argument in this matter and on August 9, 1966 issued the decision and declaratory order (JA 59) to which this petition for review is directed.

On August 19, 1966, Petitioners herein filed a petition for review with this Court.

The Statutes Involved

The relevant parts of all statutes involved are set out in the Appendix.

Statement of Points

I. The contracts for ocean carriage of military cargo are tying devices and dual rate contracts governed by section 14b of the Shipping Act, 1916.

A. The shipping contracts awarded under RFP 100 tie the shipper to the carrier in return for promise of patronage.

B. Section 14b applies in explicit terms to the tying arrangements under RFP 100.

1. RFP 100 fits within the broad terms of the definitions in section 14b.

2. The exemptions which appear in section 14b do not apply to government cargoes.

C. The Commission's arguments avoid the language and meaning of section 14b.

1. A tying arrangement covering "All or a fixed portion of the shipper's patronage" would include the RFP 100 agreements.

2. The argument that anything subject to section 14 cannot be subject to section 14b is not correct.

3. The Commission decision misreads the *Isbrandtsen* decision.

II. The bidding requirements of RFP 100 are unjust or unfair devices or means within the meaning of the first paragraph of section 16.

A. The types of "unjust or unfair devices or means" included within section 16 are many and are not limited to falsification matters.

B. Operations under RFP 100 will be marked by secrecy and concealment and will effectively destroy all competition for military cargo.

Summary of Argument

Under its Request for Proposals No. 100 (RFP 100), the Military Sea Transportation Service proposes to institute a system of dual rate contracts whereunder it promises to patronize only those carriers with whom it has Shipping Agreements in return for the carriers' sealed bid tender of rates to be firm for at least one year. Carriers not submitting bids under RFP 100 nor awarded Shipping Agreements are to be excluded from the carriage of MSTS cargo during the period the Shipping Agreements are in effect, however long that period may be.

Section 14b of the Shipping Act is comprehensive, remedial, legislation designed to control the form and content of tying arrangements between shippers and carriers. Section 14b explicitly covers contracts where the shipper promises "all or a fixed portion" of its cargo to carriers in return for lower rates. This is precisely what the contracts under RFP 100 do, and they are accordingly subject to section 14b.

Section 14b contains an exception for some types of cargo but not for cargo shipped by government agencies. Indeed, the legislative history itself clearly shows that the Comptroller General urgently requested special treatment for government cargo, that a clause providing special treatment for government cargo at one time appeared in the legislation, and that the clause was dropped. It follows that section 14b does apply to government cargo which is the cargo subject to RFP 100 procurement.

The Commission in its decision below did not give a hospitable reading to the broadly remedial statute. Instead, the Commission made a number of arguments, each of which would avoid administrative scrutiny and regulation of RFP 100 contracts pursuant to section 14b of the Shipping Act. First, the Commission held that RFP 100 contracts were not for "all or a fixed portion" of MSTS cargo. This is both a misreading of the words "a fixed portion" and a mistake as to the effect of execution of Shipping Agreements under RFP 100. The Commission ignored the fact that upon issuance of Shipping Agreements *all* MSTS cargo is pledged to signing carriers.

Next the Commission concluded simply that any arrangement subject to any other portion of section 14 of the Shipping Act—such as section 14 Fourth which forbids unfair volume discounts—cannot also be subject to section 14b. This is patently erroneous since the various portions of the Shipping Act independently apply to permit or to prohibit various practices.

The Commission also misread the landmark case of *Federal Maritime Board* v. *Isbrandtsen Company*, 356 U.S. 481 (1958). The Commission held that RFP 100 contracts were "requirements contracts" under the *Isbrandtsen* decision. They are not, because RFP 100 contracts freeze out any new or non-signing competition, just as the dual rate contract condemned in *Isbrandtsen* froze out independent competition.

Finally, the Commission offered a number of miscellaneous arguments to the effect that Congress was not considering military cargo when passing section 14b and that military cargo is like "project rate" cargo. Congress did not particularly consider military cargo when passing section 14b because at the time no military cargo moved under such RFP 100 type dual rate contracts. The appellation "project rates" adds nothing to the discussion of the problem whether a particular arrangement is subject to section 14b. Some arrangements called "project rates" may be subject to section 14b and some arrangements called "project rates" may not be.

The Commission's interpretation of the first paragraph of section 16 is based on a restrictive reading of that provision which is supported neither by the language of the statute, nor by the legislative history of the provision, nor by past agency decisions.

The Commission conclusions that the activities outlawed by the first paragraph of section 16 are limited to those activities involving misstatements or the falsification of documents is unfounded. While the provision specifically condemns "false billing, false classification, false weighing, and false report of weight", it equally condemns "unjust or unfair devices or means" whereby the shipper *attempts* to obtain or obtains transportation services at less than the proper rates. In outlawing any other unjust or unfair devices or means, Congress manifestly intended to reach all such activities, however effectuated.

RFP 100 has come into existence solely as the means whereby MSTS might utilize its position as the world's largest shipper to force ocean transportation rates down. The terms of RFP 100 are drafted to insure that MSTS will be able to wield its whip-hand to obtain the lowest possible rates; such terms also bring RFP 100 squarely within the scope of the first paragraph of section 16 and clearly earn for the new procedures the appellation "unfair or unjust".

Thus, under the new procedures carriers are required to submit secret bids which they must guarantee for at least one year despite any changes that may occur in their costs of operations during that period. The initial lowest rate carriers will get virtually all of the MSTS business they can handle and no subsequent rate reductions by their competitors can redress the imbalance. As the carriers cannot make their bids public until contracts are awarded, competitors will neither know nor be able to meet any of the rates offered and will be effectively shut out from MSTS business for a minimum of one year.

ARGUMENT

I.

The contracts for Ocean Carriage of Military Cargo are tying devices and dual rate contracts governed by Section 14b of the Shipping Act, 1916.

A. The Shipping Contracts awarded under RFP 100 tie the shipper to the carrier in return for a promise of patronage.

The Department of Defense is the largest shipper of ocean cargo in the world, and, like any large shipper, it possesses great economic power in its dealings with carriers. By the inauguration of a new system of procurement of ocean transportation services, the Military Sea Transportation Service, the shipping arm of the Department of Defense, is attempting to exercise its economic power and obtain lower rates. As a rule, large shippers can extract lower rates from carriers, and very large shippers can be expected to extract very much lower rates than smaller shippers can obtain.

The Shipping Act contains a number of sections designed on the one hand to assure that all shippers, both small and large, receive non-discriminatory treatment and, on the other hand, to preserve a climate of competition among carriers. One important and relatively new section of the Shipping Act reflecting the balance is section 14b, 46 U.S.C. § 813a (A 2).

The first issue here is whether the system of contracts contemplated by MSTS Request for Proposals No. 100 is a system of dual rate contracts which are subject to the explicit provisions of section 14b.[1]

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[1] It is probably worth emphasizing at the outset: (1) that this case in no way interferes with the flow of military cargo. Cargo has for years moved without the contract system contemplated by RFP 100, and will continue to move with or without the RFP 100 system; (2) the Commission has expressly excluded from this case any consideration of the level of rates on military cargo as unduly high or unduly low, compensatory or not (JA 63).

The heart of the new contract system envisaged by RFP 100 is the tying of MSTS as shipper to one or several carriers who promise the most favorable rates for at least a one year period. RFP 100 begins by calling for offers to carry military cargo for a one year period in particular trades at particular rates. Without more, such offers would appear to be like the public tariffs of the carriers—open to all and known to all.[2]

But there is more. First, the rate offers are not to be made publicly in tariffs but are made secretly, a subject discussed in the next portion of this brief. (Only subsequently are the accepted rates to be published in tariffs.)

Second, the offerors must promise that rates shall remain in effect for at least one year (JA 11).

Third, the offerors must promise shipment under the MSTS standard form "Shipping Agreement" (JA 11).

Offers may be in two forms. First, "open end" offers (where the MSTS is not committed to ship any specific amount) and second, cargo commitments offers for a specific volume (JA 11). In return for receiving such offers from the carriers, MSTS promises to meet the minimum cargoes promised under any cargo commitment, and to ship cargo by the lowest rate carrier provided acceptable space is available (JA 12). In addition, MSTS promises in several ways to protect bidders from the competition of outsiders who do not hold Shipping Agreements:

(1) MSTS promises all holders of Shipping Agreements that even if any holder reduces its rates, the competitive position will not be improved;

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[2] Section 18(b) of the Shipping Act, 1916, 46 U. S. C. § 817(b), added to the statute at the same time as the dual rate section, requires carriers to publish their rates in tariffs and observe the tariffs. Military cargo is obviously included under these tariff filing requirements as is shown, among other things, by the repeated references in RFP 100 to the necessity of filing rates with the Federal Maritime Commission. RFP 100 repeatedly identifies the subject transportation as "common carriage" (JA 24).

(2) MSTS promises that new carriers on the route will be excluded from carrying military cargo (except when needed space is not otherwise available); and

(3) MSTS promises that carriers who do not submit bids to MSTS will be excluded (JA 18).

What this plan amounts to is a comprehensive system tying shipper and carrier. The large shipper, MSTS, receives offers of favorable rates. In return for such offers the large shipper promises to give either a specific minimum or all its cargo to the lowest bidder. Most significantly, the shipper promises to exclude *all* newcomers, *all* non-signatories, and *all* independents from its patronage. Once the shipping agreements are awarded for the next year, the cargo is tied up and no offer of lower rates by any outsider—in fact, an offer of lower rates by anyone not participating in the scheme—will effect the distribution of cargo. This is the antithesis of open competition for cargo. In the past, such devices have been generally urged by conferences of carriers anxious to tie up the business of major shippers. In the present instance, the largest shipper is anxious to freeze competition and obtain preferential rates in return for pledges of cargo.

In *Federal Maritime Board* v. *Isbrandtsen Company, supra*, a dual rate contract of a conference was struck down as unlawful under section 14 Third of the Shipping Act.[3]

Following *Isbrandtsen*, after interim moratorium legislation, the Congress in 1960 added section 14b to the Shipping Act. Section 14b is a new statutory scheme, broad in sweep and comprehensive in its coverage, which controls the use by any carrier and by any shipper of the type of contract proposed under RFP 100. The language

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[3] The Commission here attempted to distinguish the RFP 100 agreements from the tying devices of *Isbrandtsen* (JA 73). As is demonstrated below, the Commission's argument misses the real force of the RFP 100 tying device, which is the exclusion of non-bidders (outsiders) from carriage of cargo.

of the statutory provision explicitly covers the tying arrangement proposed under RFP 100.

B. Section 14b applies in explicit terms to the tying arrangements under RFP 100.

1. *The Definition.*

Section 14b applies to all defined contracts, amendments, or modifications between carriers and shippers. Any contract subject to 14b is unlawful unless and until it is approved by the Commission after hearing.[4] The Commission has held no hearing on the contracts proposed under RFP 100 and, thus, if they are subject to section 14b they are illegal until approved.

The scope of section 14b is unrestricted; it applies to all contracts, amendments, or modifications which are available to shippers on equal terms [5] and "which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers."

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[4] The legislative history of the Act shows that this provision rendering contracts lawful "only when and as long as permitted by the Commission", and declaring contracts unlawful unless explicitly granted approval was inserted at the request of Senator Kefauver to assure that agreements would not be put into effect before approval. See Congressional Record, September 14, 1961, page 18,228, reprinted in "Index to the Legislative History of the Steamship Conference/Dual Rate Law", Senate Document No. 100, 87th Cong., 2nd Sess., p. 371. This Index to the Legislative History is the most convenient reference to the history and is referred to hereafter as "Index".

[5] Some of the briefs submitted to the Commission in this case suggested that the RFP 100 contracts were not covered by section 14b because they were not available to all shippers on even terms. The Commission did not adopt this position, as it could not, since the effect of such an argument is to make the contracts unapprovable and illegal in any form. Perhaps it could be said that these military contracts would be open to any shipper similarly situated although it would be hard to find a shipper, except perhaps a very large corporation, which would ship in any trade in as large volume as the military.

It is indisputable that the contracts under RFP 100 give lower rates to MSTS. They are supposed to give rates lower than the ordinary tariff rates for other shippers, and if they do not, RFP 100 reserves the right to ship at tariff rates. It also seems apparent that in its series of promises under RFP 100 MSTS has promised "all" or a "fixed portion" of its patronage to the bidding carriers. Thus, we read in paragraph 8 of the Instructions to Offerors the MSTS pledge that:

> "Cargo will be booked under Shipping Agreement as necessary to discharge the Government's obligations under any cargo commitment. Thereafter, cargo moving under Shipping Agreements will be booked by individual rate category in the following sequence:
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> "a. The rate favorable carrier, providing it offers acceptable space and a schedule meeting the delivery requirements of the cargo.
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> "b. In event the rate favorable carrier does not offer acceptable space or an acceptable delivery schedule, then to the carrier with the next higher rate who offers acceptable space and delivery" (JA 18-19).

This is plain enough: in return for the offers under RFP 100, MSTS is going to ship *all* its cargo by the successful bidders. If this were not plain enough, MSTS added in the next paragraph of the Instructions to Offerors a guarantee that outsiders would be excluded from the movement of cargo:

> "However, holders of all Shipping Agreements on a route shall, during the period of the Agreement, be protected from the competition of common carriers who do not hold Shipping Agreements for that route and from gross instability of rates as follows:
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> "a. Should the holders of a Shipping Agreement reduce its rates on the route(s) during the period of the Agreement, its competitive position in rela-

> tion to other holders of a Shipping Agreement shall be determined on the basis of its initial rates.
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> "b. A carrier who, after the date for responses to this Request for Proposals, begins initial common carrier operations on the route(s) will be considered for a Shipping Agreement at a negotiated rate level, but such carrier will not be utilized except on an as required basis when capability is not available for the requirement from the original holders of Shipping Agreements" (JA 19).

Here is the explicit promise to exclude outsiders which would be unlawful under the Shipping Act if it were not for section 14b, and which is unlawful under section 14b itself unless and until it meets the standards of the section and is approved by the Commission.

Petitioners claim that there can be no escape from the application of section 14b to a contract which promises that "holders of all Shipping Agreements on a route shall, during the period of the Agreement, be protected from the competition of common carriers who do not hold Shipping Agreements for that route. . . ." The law says it applies to this kind of contract and it plainly was intended to apply to this kind of contract. The report of the Senate Committee stated that the purpose of the bill was all embracing: "The primary purpose of this amended bill is to authorize ocean common carriers and conferences thereof serving the foreign commerce of the United States to enter into effective and fair dual rate contracts with shippers.[6]

The same Senate report emphasizes the importance of the safeguards which had been written into section 14b by requiring express provisions in all contracts and adding

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[6] Senate Report No. 860, 87th Cong., 1st Sess., p. 1, reprinted at "Index", p. 200.

the requirement for a Commission hearing on the contract system.[7]

The express requirements for approvable dual rate contracts contained in section 14b are not mere verbiage and the requirement for a hearing is not mere surplusage. That RFP 100 offends several of the explicit requirements of section 14b is apparent. To illustrate, the most important requirement breached is the requirement that the spread between the contract rates and the non-contract rates be not greater than 15%. (Requirement 7 of section 14b) (A 3). There is no such assurance in the RFP 100 contracts. Of course, a shipper always considers it desirable to get the lowest possible rate in return for its exclusive patronage, but section 14b prohibits the use of any tying device at more than a 15% spread in rates. The purpose of preventing a rate spread of more than 15% was obviously not because Congress disliked low rates but because Congress thought the monopolistic device had to be controlled.

Similarly, the requirement for a hearing is not mere surplusage. The carriers here who submitted their petitions to the Federal Maritime Commission were deeply concerned with the effect of a violent dislocation in military cargo shipments on their ability to maintain regular services. Absent a hearing, the Commission cannot be informed whether or not the RFP 100 contracting system will be detrimental to the commerce of the United States and the public interest or not.

2. *The Exemptions Which Do and Do Not Appear.*

Section 14b is applicable on its face to all shipments of all types of cargo except cargo "which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots." It is plain that Congress thought of what types of cargo should

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[7] Senate Report No. 860, 87th Cong., 1st Sess., p. 12, reprinted at "Index", p. 211.

be exempted from the broad thrust of section 14b and that Congress intended to exempt bulk cargo. It is equally apparent that Congress did not provide an exemption for military cargo.

The statute is plain on its face; it is meaningful and there really should be no need to refer to the legislative history. *Ex parte Collett*, 337 U.S. 55 (1949), 61; *United States* v. *Oregon*, 366 U.S. 643, 648 (1961); *In re Borchert*, 47 F.Supp. 387, 390 (S.D. Cal., 1942); *United States* v. *Center Line Gardens*, 253 F.2d 133, 136 (6th Cir. 1958).

In any event, the legislative history *is* perfectly clear that government cargo is included within the scope of section 14b. There are two compelling indications.

First, the Comptroller General of the United States wrote both to the House Committee and to the Senate Committee considering the dual rate legislation in 1961. The letter to the Senate Committee is reprinted in the Senate Report on the bill, Senate Report No. 860, 87th Cong., 1st Sess., at pp. 328-29.[8]

The Comptroller General pleaded with the Senate Committee, as he had asked the House, to include a clause in the legislation permitting the carriage of property free or at reduced rates for the United States. His letter is sufficiently important to merit reprinting in full in the Appendix (A 11). In the face of this plea by the Comptroller General warning that no special exemptions were provided for government cargo, the Senate failed to make any provision exempting government cargo from the sweep of section 14b. The House likewise did not act.[9]

Second, and more compelling still, at one point the Senate bill included the provision requested by the Comp-

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[8] Reprinted in "Index", pp. 227-228.

[9] See letter of Comptroller General to Chairman Bonner, which appears in the House Report No. 498, 87th Cong., 1st Sess., at pp. 334-35, "Index", pp. 145-46.

troller General, but this exemption was omitted from the bill in its final form.[10]

Thus, there are some exemptions in section 14b but there is no exemption for government cargo. An exemption for government cargo was urgently requested by the Comptroller General, it appeared in one draft but was removed from the final bill. There could be no more perfect demonstration that the Act, as passed, applies to government cargo. As the Comptroller General's letter points out, it is of course the law that "when Congress seeks to give the government a preferred transportation status it does so in plain terms." *United States* v. *Associated Air Transport, Inc.*, 275 F.2d 827, 838 (5th Cir. 1960).

The Commission was faced with a statute which by its terms, by its plain purpose, and by its plain legislative history could render the contracts under RFP 100 subject to Commission jurisdiction and regulatory scrutiny. The Commission avoided the responsibility to regulate by resorting to three arguments. We consider each of these in turn below.

C. The Commission's arguments avoiding the language and meaning of the statute.

1. *"All or a Fixed Portion."*

The Commission begins its discussion of the applicability of section 14b with an argument that the contracts under RFP 100 are not subject to section 14b because they are not, in the statutory language, contracts for "all or a fixed portion of the shipper's patronage". The Commission found that under the cargo commitment type of contract MSTS committed itself to ship a "minimum amount" of cargo, and the Commission did not find minimum amount

[10] See Subcommittee Print, H. R. 6775, August 8, 1961, "Index", p. 196, and the note in the Senate Report No. 860, 87th Cong., 1st Sess., at p. 19 ("Index", p. 218), to the effect that at the request of the Comptroller General provision was added for carriage of property free or at reduced rates for the United States.

equivalent to "fixed portion" (JA 70). Referring to Webster's New Collegiate Dictionary, the Commission discovered that a portion is "part of the whole" but determined that a commitment to carry at least 1,000 tons of a shipper's cargo, while "fixed" is not a "fixed portion".

It is a fair paraphrase of this exercise to say that the Commission held that section 14b applies only to contracts for 100% or some other invariable *percentage* of a shipper's cargo. If, for example, a shipper customarily had 10,000 tons moving in a trade and he contracted with a carrier at a special low rate to move 9,000 tons, the Commission would hold this to be not a dual rate contract. In contrast, if the shipper in the example contracted for exactly 90% of his cargo to move by the carrier at the special low rate, the Commission's logic would hold this a dual rate contract under the control of section 14b.

In short, the Commission's argument from the language of the statute is that when Congress said a "fixed portion" Congress meant a "fixed percentage". We submit that the language says and means a fixed portion, and that a commitment of a substantial portion of a shipper's annual business (not just a 100 ton or 50 ton parcel) is a contract for a "fixed portion" of the shipper's business.[11]

Entirely apart from semantics, the Commission's argument neglects one vital feature of the contracts under RFP 100. This feature is the absolute promise of MSTS to give

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[11] In place of the Commission's citation to Webster's Collegiate Dictionary, we offer the definitions of the more authoritative Webster, Webster's International Dictionary, Second Edition, which defines "Portion" as:

> "1. An allotted part; a share; a parcel; a division in a distribution.
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> * * *
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> "4. A part of a whole. Specif.: *a* A constituent part; as, the larger *portion* of the population. 'Portions of one power, which is mine.' *Shelley*. *b* A part abstracted from a whole; a limited amount or quantity. 'Give but that *portion* which yourself proposed.' *Shak.*"

not just a fixed portion but *all* of its cargo to the carriers entering into shipping agreements. We have quoted above paragraphs 8 and 9 of the Instructions to Offerors. We repeat that those paragraphs commit MSTS to book *all* cargo with the "rate favorable carriers" under the Shipping Agreement and to book *all* cargo with holders of the Shipping Agreement, explicitly excluding any new carriers, any existing carriers without shipping agreements, or any carriers changing rates during the one year period. This is a perfect and complete competition-freezing scheme, which chills competition for MSTS cargo to absolutely zero, and which plainly renders the contracts (with or without cargo commitment) subject to section 14b of the Act.

The very heart of the dual rate contract is the part of the bargain which ties the shipper to the conference lines in return for the conference lines' concession of a lower rate. Congress has approved such tying arrangements, but has approved them only when they meet the standards of section 14b. There is no escape from the proposition that under RFP 100 MSTS has committed itself to the lines signing the Shipping Agreement. It follows that section 14b is applicable.

2. *The Argument that Anything Subject to Section 14 Cannot be Subject to Section 14b.*

The second Commission argument avoiding application of section 14b to RFP 100 contracts is at best confusing. The Commission says that under section 14 Fourth of the Shipping Act, 46 U.S.C. § 812 (A 1), it is unlawful for a common carrier by water to "make any unfair or unjustly discriminatory contract based on volume of freight offered." Then, says the Commission, if contracts for volume shipment are subject to section 14b what contracts may be made under 14 Fourth? (JA 71).

This argument is particularly shallow in view of the explicit purpose of section 14b. Section 14b was passed to permit certain contracts to be made *which otherwise would*

have been illegal. Most dual rate contracts would have been illegal under section 14 Third pursuant to the decision of the Supreme Court in *Federal Maritime Board* v. *Isbrandtsen Co., supra.* Thus, the fact that a particular arrangement runs afoul or does not run afoul of some other portions of the Shipping Act has exactly nothing to do with whether section 14b is applicable.

The answer to the Commission's self-imposed dilemma with respect to what contracts can be made under section 14 Fourth is simple. Looking only to section 14 Fourth, that section forbids unfair contracts based on volume, and does not forbid fair contracts. A contract for shipment based on volume may have no tying effect on a shipper at all—it may be simply a rate which calls for a rate of say $10 if 10,000 tons are shipped, $15 if 15,000 tons are shipped, and $30 if only one ton is shipped. Such volume discounts have been the concern of regulating agencies for years and do not effect the tying problems raised under section 14b.

3. *The Commission Decision Misreads the Isbrandtsen Case.*

Moving on, the Commission decision announces that section 14b does not apply to RFP 100 contracts because such contracts are not like the dual rate contracts condemned in *Federal Maritime Board* v. *Isbrandtsen, supra.* The Commission quotes from the Supreme Court's discussion of "requirements contracts", and says that the contracts here under consideration are similar to "requirements contracts". From this, the Commission concludes that section 14b did not alter "the long-standing status of these contracts". To this sort of logic there are two conclusive replies:

First, the type of contract which the *Isbrandtsen* case dealt with is not, as the Commission assumes, the only type of contract covered by section 14b. Section 14b is a broad remedial piece of legislation which the Commission for unknown reasons determines to read extremely narrowly.

Thus, section 14b very clearly applies in explicit terms to dual rate contracts of a single carrier, although the Supreme Court was concerned with a conference use of the device, and almost all the testimony before the Congress which enacted section 14b dealt with conference uses of the device. So here, even if it were true that the Supreme Court decision in the *Isbrandtsen* case did not deal with contracts such as those under RFP 100 it still would not follow that section 14b does not apply to the contracts under RFP 100. The place to find out what section 14b says and means is in section 14b.

Second, in any event, the Commission has misread the *Isbrandtsen* case and has not made a proper comparison of the contracts before the Court in *Isbrandtsen* and the contracts under RFP 100. The Supreme Court held in *Isbrandtsen* that "the revealed Congressional purpose in section 14 Third . . . was to outlaw practices in addition to those specifically prohibited elsewhere in the section when such practices are used to stifle the competition of independent carriers" (366 U.S. at 495). The vice of the contracts under consideration in *Isbrandtsen* was that the contracts were a "resort to other discriminating or unfair methods" which the Court held were meant "to stifle outside competition in violation of section 14 Third," (356 U.S. at 493). There is no way to read the *Isbrandtsen* case except as holding that section 14 Third outlawed "conference practices designed to destroy the competition of independent carriers" (366 U.S. 492, 493). In *Isbrandtsen* the contract actually before the Court was struck down because it was designed to destroy independent competition and that is precisely the effect of the contracts under RFP 100.

Under RFP 100 MSTS promises not to use any carriers not signing up; MSTS promises not to use any new carriers; MSTS promises to dispose of its cargoes among offering carriers in accordance with the price paid, no matter if one of the offerors thereafter changes its rate. A new carrier,

or a carrier "outsie" the circle of offerors, or a carrier whose offer is deficient in some technical way, or a carrier whose offer is 5 cents a ton above the lowest bidder has no recourse. It is shut out from the major source of cargo for U.S. flag ships for a period of an entire year. Its competition is not just stifled—it is totally ignored. Such a system would have been struck down in an instant under the *Isbrandtsen* doctrine, and it is equally outlawed by section 14b, the remedial legislation which followed the *Isbrandtsen* decision.

4. *The Miscellaneous Commission Arguments.*

We are frank to say that we find the last few pages of the Commission's discussion of the section 14b issue extremely confusing. The Commission begins (JA 75) by mentioning the Comptroller General's letter to Congress which warned that a special exemption should be put in for government cargo.[12]

The Comptroller General in the course of his letter explained that cases such as *United States* v. *Associated Air Transport*, 275 F.2d 827 (5th Cir. 1950), and *Slick Airways* v. *United States*, 292 F.2d 515 (Ct. Cl. 1951), had held that unless government cargo was specifically exempted from a transportation statute it would be held to be subject to such a statute.

Petitioners had argued to the Commission that the Comptroller General's letter and the cases cited by him put Congress on notice that unless government cargo was exempted from the legislation being passed, government cargo would be subject to the legislation—and that is exactly what happened.

The Commission's decision "meets" these cases by indirection, saying that *Slick* and *Associated Air Transport* deal with non-exemption of government cargo from tariffs

[12] The letter is quoted in full in the Appendix to this Brief (A 11).

(JA 76). To be sure, they do, but these cases were not cited to the Commission for the proposition that government cargo was or was not subject to tariffs; instead they were cited to the Commission for the proposition that government cargo is subject to transportation statutes unless exempted. The Commission's analysis is simply of no relevance to the principle for which the cases were cited. Similarly, the Commission's discussion is of no relevance to the proposition that by rejecting the Comptroller General's request the Congress expressly included government cargo within the scope of section 14b and the other remedial legislation passed at the same time.

Next, the Commission shifts gears rather sharply and announces that "the legislative history makes it clear to us that shipper and consignee as used in section 14b have a distinct and somewhat limited frame of reference" (JA 77). This is in itself a fairly startling argument by an agency employed to administer a sweeping and broadly remedial statute.

Nevertheless, the Commission determined that section 14b reveals the "commercial" nature of the problems dealt with therein. The Commission points to the fact that defense cargo is vitally important to American-flag lines, and yet military cargo was discussed in the legislative history of section 14b only to the extent that the Navy indicated section 14b was of no concern to it.[13]

While it is not clear whether the Commission is reciting some arguments of parties to the proceeding below or stating its own views, it is clear that the arguments do not advance consideration of the real issue which is the language and meaning of section 14b. At the time the Congress was considering section 14b the military services did *not* engage in RFP 100 dual rate contracting. They did *not* ship

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[13] Letter of March 17, 1961, from a Captain Rice to Congressman Bonner, announcing that "the proposed legislation would have no effect on the Department of Defense shipments. . . ." House Report No. 498, 87th Cong., 1st Sess., p. 36; "Index", p. 147.

cargo by agreements with a restricted number of American-flag lines under any sort of competitive bidding system, and as far as we know, there was no suggestion at that time that any RFP 100-type system was even contemplated. The absence of testimony is thus obviously caused by the absence of any issue as to military dual rate contracts. There never had been any such contracts, and as far as anyone knew, there never would be any.[14]

Finally, the Commission decision talks about the subject of so-called "project rates" (JA 79). Just what project rates are is by no means clear. There are doubtless a number of "project rates" which are not subject to the requirements of section 14b. Many projects rates are obviously nothing more than a special type of tariff rate quotation in which carriers quote a single rate for all items moving into construction of a factory rather than a myriad of separate rates for bricks, mortar, air ducts, machinery, etc.[15]

The Commission was at pains to quote one paragraph from its 1965 fact-finding investigation which suggests that "everyone" agrees that project rate cargoes do not enter the stream of commerce. Next, the Commission asserts that if the contention that RFP 100 contracts are subject to 14b is adopted, then all project rates would be subject to section 14b—and that would be terrible (JA 79).

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[14] For many years prior to RFP 100 military cargo had moved at rates negotiated between the MSTS and carriers. These rates were the same for all American-flag carriers, and cargo was allocated among all carriers in proportion to their number of sailings. The system was eminently fair as among carriers, non-coercive and highly workable. It is still in effect as of this writing in trades as to which no RFP 100-type procurement has as yet been made.

[15] See the Commission's Report in *Fact-Finding Investigation No. 8*, 6 Pike & Fischer SRR 535. A great many of the arrangements discussed in this fact-finding investigation were very clearly nothing at all like the tying arrangement contemplated here. A few were.

Again, there are several appropriate answers to the Commission's discussions.

In the first place, the very fact-finding report referred to by the Commission also notes that "those conferences based on the Pacific Coast consider project rate arrangements to be subject to their dual rate contracts, so shippers who have signed a dual rate contract get a project rate that is based on the contract rate while others are given a higher 'non-contract project rate'" (6 SRR 535, 558). Evidently, the "project rate" problem is separate from the "dual rate" question, and some conferences have treated their project rates as subject to their dual rate contracts, while others have not. This may be an interesting subject for the Commission to study and investigate, but it does not advance the interpretation of section 14b.

Second, it is impossible to see why the Congress should not be outlawing a "venerable" or "historic" practice by passing section 14b. We too do not believe that Congress intended to outlaw project rates by passing section 14b, nor do we believe that it intended to approve every sort of contractual arrangement which was called a "project rate". The truth of the matter is that some things which are called "project rates" may be perfectly legal and may or may not be subject to section 14b, while other arrangements called "project rates" may be otherwise illegal and they too may or may not be subject to section 14b. The applicability of section 14b does not depend on whether rates are quoted in dollars, cents or Brazilian cruzieros, and the applicability of section 14b does not depend on whether the rates are called "project rates".

Military cargoes are a huge portion of the cargoes carried by American-flag ships. The exclusion of an American-flag carrier from participation in the movement of military cargo may mean its extinction. The Congress indicated by the language of section 14b, and in its explicit legislative history, an intention to make no special exemption for government cargoes.

This decision not to exclude government cargoes is quite understandable, since the Congress was passing broadly remedial legislation. Section 14b deals in a fairly even-handed manner with both carriers and shippers. It permits certain approved types of tying arrangements, but it places special safeguards around the type of arrangement which can be approved. It is broad in its sweep, it is remedial, and exclusions should not be read into it.

The Commission, armed with this broad mandate, has now announced in the decision here under review that the statute will be read as narrowly as possible. This is no way to treat a major piece of remedial legislation. The contracts under RFP 100 are subject to the explicit language and the obvious intent of section 14b. The effect of the contracts under RFP 100 is to create an all-embracing tying system for the single largest block of cargo moving on American-flag ships. Under the guise of "competitive bidding" the economic power of the largest shipper is used to chill competition among existing carriers and freeze out competition from any new carrier. Congress intended no such result, and the Commission's misreading of section 14b of the Shipping Act should be corrected by reversal of its decision.

II.

The bidding requirements of RFP 100 are unjust or unfair devices or means within the meaning of the first paragraph of Section 16.

A. The Nature of the "Unjust or Unfair Devices or Means" Prescribed by Section 16.

The first paragraph of section 16 of the Shipping Act, 1916, 46 U.S.C. § 815 (A 5), provides that:

> "It shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and wilfully, directly or indirectly, by means of false

> billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable."

Before the Commission, Petitioners urged that the procurement system represented by RFP 100 was an "unjust or unfair device or means" in violation of the quoted provision. The Commission concluded otherwise (JA 81). That determination, involving application of the statute in a not previously considered context, is not entitled to the deference which courts often accord a long-standing interpretation by an administrative agency of the statute it administers. *Lukens Steel Co.* v. *Perkins*, 107 F.2d 627, 634 (D.C. Cir., 1939) *rev'd on other grds*, 310 U.S. 311; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 113 (1933); *Porter* v. *Tankcar Gas, Inc.*, 68 F.Supp. 103, 110 (D. Minn., 1946).

The first paragraph of section 16 was added to the Shipping Act in 1936, some 20 years after the original legislation was enacted. As originally passed, the statute had governed only the malpractices of carriers, and of terminal and other related operators included within the definition in section 1 of the Shipping Act of "other persons subject to this Act". Experience since the statute was first enacted had shown, however, that shippers, agents and brokers also engaged in conduct conflicting with the underlying objectives of the statute. The 1936 legislation, adding the first paragraph of section 16, was designed to bring such conduct within the Act.

As originally drafted, the bill, in terms very similar to those finally adopted, broadly condemned attempts to obtain transportation at less than rates which would otherwise apply by "means of false billing, false classification, false weighing, false report of weight or by any other device

or means." S. 3467, 74th Cong., 2d Sess. (1936). The House Committee Report explained that the legislation was designed both to prevent shippers, by improper practices, from producing inequality among shippers, and to protect the carriers from shippers who seek to take advantage of "the carriers itself by depriving the carrier of a rightful source of revenue."[16] Subsequent decisions interpreting the section confirm that it applies to shipper misconduct both where the shipper undertakes to deceive the carrier, and where the carrier, as a favor or in order to retain a shipper's business, participates in the malpractice. *Hohenberg Bros. Co.* v. *Federal Maritime Commission*, 316 F.2d 381, 384 (D.C. Cir. 1963); *United States* v. *Peninsular & Occidental Steamship Co.*, 208 F.Supp. 957, n. 1 (S.D. N.Y. 1962).

As reflected by its language, the 1936 bill was directed primarily at fraudulent shipper practices, such as false billing and false classification, instances of which were revealed at hearings. But it is also clear that the bill was not limited specifically to the enumerated conduct. This is apparent from the language of the bill itself, which as introduced condemned attempts at obtaining reduced rates "by any other device or means." It also is clear from the legislative history of the measure. Thus, the language as initially introduced was understood as extending to legitimate as well as illegitimate attempts at obtaining reduced rates. Specifically, a number of shipper and forwarder witnesses condemned the legislation as unduly broad because they interpreted it as prohibiting payment of legitimate brokerage to forwarders, and legitimate attempts by shippers and forwarders to secure rate reductions by negotiations.[17] While other witnesses before the Committee did not agree with this interpretation of the statute, the

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[16] House Report No. 2205, 74th Cong., 2d Sess., pp. 1-2.

[17] See Hearings before the House Committee on Merchant Marine and Fisheries on S. 3467, 74th Cong., 2d Sess., pp. 12-13, 27, 29.

words "unjust or unfair were added to the phrase "any other device or means" as finally enacted to meet this criticism, and insure that the measure was confined to the specific fraudulent practices enumerated and to improper practices otherwise contrary to the objectives of the Shipping Act.

In its decision below, the Commission strained mightily to restrict the meaning of the first paragraph of section 16 by limiting the words "or by any other unjust or unfair devices or means" to the types of falsification condemned in the preceding phrases of that section (JA 83). To that end, the Commission cited several of its decisions which demonstrate that section 16 was directed to misclassification, the withholding of information, false billing, etc. (JA 83). It ignored, however, decisions construing the same words "by any other unjust or unfair device or means" in section 16 Second which indicate that section 16, in its several parts, was intended to reach *all rate concessions* of any description that are unjust or unfair. See *Pacific Far East Line Inc. Storage Practices*, 6 F.M.B. 301 (1961) and *Practices of Fabre Line and the Gulf/Mediterranean Conference*, 4 F.M.B. 611 (1955).

B. The secrecy and concealment demanded by RFP 100 and the impact on effective competition.

It is obvious that the specific MSTS procurement practice which was considered by the Commission below was neither brought to the attention of the Congress, nor specifically considered by it. But decisions under the section have interpreted a "device or means" which accomplishes a rate departure through the use of concealment as automatically the "unfair or unjust device or means" contemplated. Thus, directing its comments to section 16 Second (which condemns carrier misconduct in language substantially identical to that of the first paragraph of section 16) (A 5), the Court in *Prince Line, Ltd.* v. *American Paper*

Exports, Inc., 55 F.2d 1053 at 1055 (2d Cir. 1932), found the conduct under consideration was:

> " 'an unfair device or means,' for it destroyed that equality of treatment between shippers, which it was the primary purpose of the section, and for that matter of the whole statute, to maintain . . . The law did not forbid all concessions to a shipper; apparently it assumed that if those were above board, and known or ascertainable by competitors, the resulting jealousies and pressure upon the carrier would be corrective enough. But it did forbid the carrier to grant such favors, *when accompanied by any concealment*, and its command in that event was as absolute as though it had been unconditional." (emphasis supplied) [18]

It can hardly be disputed that the competitive procurement procedure represented by RFP 100 is a calculated attempt to obtain transportation at substantially reduced rates, through the device or means of competitive bidding and based on MSTS coercive power as the world's largest shipper. The Commission recognized this in its order of investigation: "the avowed purpose of MSTS in adopting the new procurement policy is to achieve savings in transportation costs through the reduced rates which it is hoped will be forthcoming under competitive bidding" (JA 1). And this objective has been proclaimed by representatives of the Department of Defense in proceedings before the Commission, Federal Maritime Commission Docket No. 65-13, Goodbody Affidavit, pp. 17-19, and in hearings before the Congress, Hearings before the Subcommittee on Merchant Marine and Fisheries of the Senate Commerce Committee on S. 3297, 89th Cong., 2d Sess. pp. 12-13, 20 (1966).

The procedures by which this reduction is to be accomplished are, moreover, "unfair or unjust" within the stand-

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[18] See, also, *United States v. Peninsular & Occidental Steamship Co.*, 208 F. Supp. 957, 958 (S. D. N. Y., 1962), stating that whether a rebate to a shipper constituted "any other unjust or unfair device or means" in violation of the statute "depends on whether the parties concealed or attempted to conceal it."

ards heretofore laid down in decided cases. RFP 100 calls upon each carrier to submit a bid establishing the rates at which it will transport MSTS cargoes. The carriers are required to guarantee to maintain these rates for at least an entire year (JA 11). And these rates (or rates secretly negotiated by MSTS with the individual carriers based on the bids) will govern the competitive posture of all carriers shipping under MSTS Shipping Agreements in a given trade for the full year period, since for this period MSTS has undertaken to ship all available cargo by the carrier which has contracted at the lowest rate and which can carry the cargo, regardless of subsequent rate adjustments by competing carriers (JA 19). The terms of RFP 100 explicitly prohibit individual carriers from making public the terms of its bid prior to the time a contract is awarded (JA 13) with the result that none of the bidding carriers will know or be able to meet the rates at which its competitors are offering transportation services. RFP 100 is in effect requesting each line to submit a secret promise of a rate reduction which will in practical competitive effect, if not in fact, be concealed from its competitors for the year. It incorporates precisely the element of affirmative concealment which the decided cases have viewed as the touchstone of an "unjust or unfair device or means."

The Commission has rejected the foregoing analysis. Its arguments, Petitioners believe, either ignore the import of RFP 100, or the language of the statute itself.

First, the Commission reasons that if the statute were interpreted as the carriers urge, it would be read as barring "virtually all competition" (JA 81). If our argument were made in the context of an invitation to carry a single shipment we would perhaps agree. But what the Commission overlooks is that bids submitted in response to RFP 100 will govern the disposition of *all* shipments for an entire year. During that period it will entirely foreclose any rate adjustment by the carriers. This is entirely contrary to the policy of the Shipping Act. Specifically, the tariff filing pro-

vision of section 18(b) of the Act, as its legislative history reveals, was designed to insure to carriers—as well as to shippers—the competitive advantages resulting from availability to and notice of the rates which competitors propose to charge for their services. See Hearings Before the Special Committee on Steamship Conferences of the House Merchant Marine and Fisheries on H.R. 4299, 87th Cong., 1st Sess. pp. 212, 363-64, 367, 416. It is RFP 100, not our application of section 16 to it, which "will eliminate virtually all competition."

Second, analogizing RFP 100 to a simple undertaking of a shipper to obtain a change in rates, the Commission concludes that that Act was never intended to bar such conduct (JA 81). Through RFP 100, MSTS has established a competitive procedure by which it undertakes not only to obtain reduced rates, but to freeze both rates and the competitive posture of the individual carriers for a full year period. As an initial matter, therefore, the analogy to a shipper seeking a simple rate change is entirely misplaced. The procedures by which MSTS seek to accomplish the rate reduction further destroy the Commission analogy. Rate reductions are to be achieved by means of a competitive bidding system. Such a system, where rates must inevitably reflect the size and importance of the shipper and the individual carrier's need for the cargo rather than the transportation conditions under which they will be shipped, is itself in conflict with the statute, specifically with section 14 Fourth of the Act, 46 U.S.C. § 813 (A 1), which bars "any unfair or unjustly discriminatory contract with any shipper based on volume of freight offered." Thus, the Commission decision itself stated:

> "The section [section 14 Fourth] doesn't outlaw all contracts based on volume of freight offered; it proscribes only those which are unfair or unjustly discriminatory. But how is such a contract to be unfair or unjustly discriminatory? Obviously, if the advantages offered under it are not based upon transportation factors which are altered by the 'volume of freight offered'." (JA 64-5)

Further, noting that RFP 100 by its terms requires that the individual carriers file with the Commission the rates at which they have contracted to carry MSTS cargo, the Commission on several grounds argues that this filing saves the procedure from any violation of the section which otherwise might obtain. One argument is based on the fact that the cases in which a violation heretofore has been found have involved only concealed departures from the tariff rate (JA 83). But, as we have pointed out above, the freezing of rates for a full year period, based on competitive bids secretly submitted, has precisely the same competitive impact as would actual concealment for that period.

In interpreting the first paragraph of section 16 the Commission took the view that the paragraph "clearly contemplates, not that the tariff rate will not be changed, but rather that the tariff rate will ostensibly remain in effect while some other rate is actually paid the shipper" (JA 83). In other words, in the Commission's opinion, only unjust or unfair deviations from *existing* tariff rates come within the prohibition of the first paragraph of section 16. To support this interpretation, the Commission quoted from the House Report on S. 3467, House Report No. 2205, 74th Cong., 2d Sess. (JA 82), without identifying its quotation and without recognizing that the Report was directed to a materially different version of S. 3467 than was finally enacted.

Thus, the version of the first paragraph appearing in the House Report read:

> "Sec. 16A. Any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, who shall knowingly and willfully, directly or indirectly, by false billing, false claim, false representation, or any other device or means, whether with or without the consent or connivance of the carrier, its officer, agent, or employee, obtain or attempt to obtain transportation for property by any common carrier subject to the provisions of the Act *at less than the regular rates*

> *or charges then in force by such common carrier;* or who shall knowingly and willfully, directly or indirectly, by false claim, false representation, or other device or means obtain, or attempt to obtain, any allowance, refund, or payment in connection with or growing out of the transportation of such property, whether with or without the consent or connivance of the carrier, its officer, agent, or employee, *whereby the compensation of such carrier shall be less than or different from the regular rates or charges in force by such common carrier at the time of such transportation*, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof in any court of the United States of competent jurisdiction, be subject for such offense to a fine of not less than $1,000 nor more than $3,000." (emphasis supplied)[19]

In this form, the proposed first paragraph of section 16 was derived almost exactly from section 10(3) of the Interstate Commerce Act, 49 U.S.C. § 10(3) which likewise pertained only to existing rates presently in force. As enacted, however, the first paragraph of section 16 forbade unjust devices or means utilized to obtain transportation" at less than the rates or charges which would *otherwise be applicable.*" Clearly, this latter phrase was intended to cover prescribed deviations from rates that might be established in the future pursuant to some scheme, as well as those actually in existence and in force. Any other interpretation would vitiate the whole purpose of the section. The Commission interpretation would enable a conspirator—where no rate on a commodity existed or where a pre-existing rate had been properly and formerly withdrawn—to obtain whatever reduced rate he could extort without regard to the transportation characteristics or the type and nature of the cargo. After the reduced rate was filed with the Commission, the parties would be immune from prosecution under section 16 since the shipper would only be paying the rate in effect and would not be paying some other lower

[19] H. Report No. 2205, 74th Cong., 2d Sess., pp. 3-4.

rate than the rate ostensibly in effect. The illegal reduction would be obtained before the rate was filed and put in force.

After S. 3467 had been approved by both the Senate and the House of Representatives and House Report No. 2205 issued, the bill was recommitted to the House Committee on Merchant Marine and Fisheries for additional hearings. The final version of the bill was accompanied by House Report 2598, 74th Cong., 2d Sess. (1936)—ignored by the Commission below—which indicated the first paragraph was intended to cover rates of any sort, situations where improper reductions were effected after a rate was filed, as well as situations where the improprieties were brought about before any rate was put in force, that is, in the process of negotiating a rate. Negotiated rates, otherwise proper, were to remain so:

> "It is not intended that the language of the new amendment shall prohibit any negotiated rate which at this time would be permitted under the law, and it is believed that this fear on the part of shippers, consignors, consignees, forwarders, brokers, or other persons is met by the use of the words 'at less than the rate or charge that would otherwise be applicable.'" H. Rept. No. 2598, 74th Cong., 2d Sess. p. 3.

The Commission's interpretation of the first paragraph of section 16 also overlooks the specific language of the statute, which makes it improper for "any shipper . . . to obtain or *attempt to obtain* transportation at lowered rates" (emphasis supplied). Since the statute prohibits an *attempt* as well as the completed act, the statute necessarily extends to unjust or unfair attempts at obtaining reduction of the rates in effect at the time the attempt is made.

While not articulated in the decision, the Commission's decision would seem in large measure the product of the fact that it is the United States which is utilizing the procedures in issue, and that competitive bidding is a procurement practice having broad application in other spheres of Govern-

ment activity. But the procurement statutes do not require application of competitive procurement to ocean shipping. Op. Comp. Gen., B-95832, June 23, 1966. The issue before the Commission, therefore, was the propriety of that procurement system under the standards of competition which Congress has established for the steamship industry, and not the validity of that procurement system under other statutes and in other industries.

Conclusion

For the foregoing reasons, Petitioners pray that this Court:

1. Set aside a report and order of the Commission served on August 9, 1966; and

2. Grant such other or further relief as to the cause may require or as may be deemed just and proper.

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APPENDIX

Section 14 of the Shipping Act

"That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

"First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term 'deferred rebate' in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

"Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term 'fighting ship' in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

"Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

"Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight

offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

"Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense: *Provided*, That nothing in this section or elsewhere in this Act, shall be construed or applied to forbid or make unlawful any dual rate contract arrangement in use by the members of a conference on May 19, 1958, which conference is organized under an agreement approved under section 15 of this Act by the regulatory body administering this Act, unless and until such regulatory body disapproves, cancels, or modifies such arrangement in accordance with the standards set forth in section 15 of this Act. The term 'dual rate contract arrangement' as used herein means a practice whereby a conference establishes tariffs of rates at two levels the lower of which will be charged to merchants who agree to ship their cargoes on vessels of members of the conference only and the higher of which shall be charged to merchants who do not so agree."

Section 14b of the Shipping Act

"Notwithstanding any other provisions of this Act, on application the Federal Maritime Commission (hereinafter 'Commission'), shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract, amendment, or modification thereof, which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers unless the Commission finds that the contract, amendment, or modification thereof

will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and provided the contract, amendment, or modification thereof, expressly (1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice; (2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days; (3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: *Provided, however,* That it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract; (4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available; (5) limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law: *Provided, however,* That the contract may specify that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling; (6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice; (7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission

finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates; (8) excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots: *Provided, however,* That upon finding that economic factors so warrant, the Commission may exclude from the contract any commodity subject to the foregoing exception; and (9) contains such other provisions not inconsistent herewith as the Commission shall require or permit. The Commission shall withdraw permission which it has granted under the authority contained in this section for the use of any contract if it finds, after notice and hearing, that the use of such contract is detrimental to the commerce of the United States or contrary to the public interest, or is unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. The carrier or conference of carriers may on ninety days' notice terminate without penalty the contract rate system herein authorized, in whole or with respect to any commodiy: *Provided, however,* That after such termination the carrier or conference of carriers may not reinstitute such contract rate system or part thereof so terminated without prior permission by the Commission in accordance with the provisions of this section. Any contract, amendment, or modification of any contract not permitted by the Commission shall be unlawful, and contracts, amendments, and modifications shall be lawful only when and as long as permitted by the Commission; before permission is granted or after permission is withdrawn it shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract, amendment, or modification. As used in this section, the term 'contract shipper' means a person other than a carrier or conference of carriers who is a party to a contract the use of which may be permitted under this section."

Section 16 of the Shipping Act

"That it shall be unlawful for any shipper consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and wilfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

"That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided*, That within thirty days after enactment of this Act, or within thirty days after the effective date or the filing with the Commission, whichever is later, of any conference freight rate, rule, or regulation in the foreign commerce of the United States, the Governor of any State, Commonwealth, or possession of the United States may file a protest with the Commission upon the ground that the rate, rule, or regulation unjustly discriminates against that State, Commonwealth, or possession of the United States, in which case the Commission shall issue an order to the conference to show cause why the rate, rule, or regulation should not be set aside. Within one hundred and eighty days from the date of the issuance of such order, the Commission shall determine whether or not such rate, rule, or regulation is unjustly discriminatory and issue a final order either dismissing the protest, or setting aside the rate, rule, or regulation.

"Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

"Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense."

Section 18(b) of the Shipping Act

"(1) From and after ninety days following enactment hereof every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission and keep open to pulbic inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established. Such tariffs shall plainly show the places between which freight will be carried, and shall contain the classification of freight in force, and shall also state separately such terminal or other charge, privilege, or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, or charges, and shall include specimens of any bill of lading, contract or affreightment, or other document evidencing the transportation agreement. Copies of such tariffs shall be made available to any person and a reasonable charge may be made therefor. The requirements of this section shall not be applicable to cargo loaded and carried in bulk without mark or count, or to cargo which is softwood lumber. As used in this paragraph, the term 'softwood lumber' means softwood lumber not further manufactured than passing lengthwise through a standard planing machine and crosscut to length, logs, poles, piling, and ties, including such articles preservatively treated, or bored, or framed, but not including plywood or finished articles knocked down or set up.

"(2) No change shall be made in rates, charges, classifications, rules or regulations, which results in an increase in cost to the shipper, nor shall any new or initial rate of any common carrier by water in foreign commerce or conference of such carriers be instituted, except by the publica-

tion, and filing, as aforesaid, of a new tariff or tariffs which shall become effective not earlier than thirty days after the date of publication and filing thereof with the Commission, and each such tariff or tariffs shall plainly show the changes proposed to be made in the tariff or tariffs then in force and the time when the rates, charges, classifications, rules or regulations as changed are to become effective: *Provided, however,* That the Commission may, in its discretion and for good cause, allow such changes and such new or initial rates to become effective upon less than the period of thirty days herein specified. Any change in the rates, charges, or classifications, rules or regulations which results in a decreased cost to the shipper may become effective upon the publication and filing with the Commission. The term 'tariff' as used in this paragraph shall include any amendment, supplement or reissue.

"(3) No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

"(4) The Commission shall by regulations prescribe the form and manner in which the tariffs required by this section shall be published and filed; and the Commission is authorized to reject any tariff filed with it which is not in conformity with this section and with such regulations.

Upon rejection by the Commission, a tariff shall be void and its use unlawful.

"(5) The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

"(6) Whoever violates any provision of this section shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

COMPTROLLER GENERAL OF THE UNITED STATES

Washington, August 3, 1961.

B-97278

Hon. Warren G. Magnuson,
Chairman, Committee on Commerce,
U. S. Senate

Dear Mr. Chairman: Further reference is made to your letter of June 15, 1961, acknowledged on June 16, requesting the comments of the General Accounting Office concerning H. R. 6775, 87th Congress, 1st session, entitled "An act to amend the Shipping Act, 1916, as amended, to provide for the operation of steamship conferences."

The subject act is a matter of policy for determination by the Congress and, therefore, we make no recommendation with respect to its enactment. However, in the event the measure is given favorable consideration by your committee, we would like to suggest that in order to better protect the interests of the United States as a shipper by permitting the transportation of its property at reduced rates, there

should be added to the proposed act a clause similar to that contained in section 6 of the Intercoastal Shipping Act, 1933, which reads as follows:

> "That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates, for the United States, State, or municipal governments, or for charitable purposes."

See also the Interstate Commerce Act, as amended (49 U.S.C. 22).

We urge the adoption of the foregoing amendment for the following reasons:

Section 4(b)(3) of the proposed legislation provides as follows:

> "No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Board and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates, or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs."

In this connection, attention is invited to the recent case of *Slick Airways, Inc.* v. *The United States,* Court of Claims No. 60-58, decided July 19, 1961, involving a situation wherein the Government in seeking a reduced rate for the United States contended that while section 403(b) of the Federal Aviation Act of 1958 does not permit reduced rates to the Government, there is nothing in the act to prevent it. In disposing of this contention, however, the court held, after quoting section 403(b) that—

> "While the act is definite as to the classes of persons to whom air carriers are authorized to furnish free or reduced-rate transportation, the Government is not included in such exceptions to the general prohibition against 'greater or lesser or different compensation for air transportation * * * than the rates, fares, or charges specified in its currently effective tariffs.'"

Also, in the case of United States v. Associated Air Transport, Inc., 275 F. 2d 827, 838, the court of appeals, in considering the Government's assertion of preferential status under the Civil Aeronautics Act, stated that the "short of it is that when Congress seeks to give the Government a preferred transportation status, it does so in plain terms."

In the light of the above judicial interpretations, and since the proposed legislation makes no provision for reduced rates to the Government as a shipper, we strongly recommend to your committee the advisability of adopting the amendment suggested above. Otherwise, since under the proposed bill a private shipper may participate in exclusive patronage agreements for less than published tariff rates, it appears obvious that to this extent the Government would be discriminated against by being bound by the tariff requirements set forth in Section 4(b)(3) of the present bill.

In response to your letter of July 17, 1961, acknowledged on July 19, requesting our comments concerning an amendment to H.R. 6775, intended to be proposed by Senators Gruening and Bartlett, we have no recommendation to offer.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the
United States.

REPLY BRIEF FOR PETITIONERS

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,414

AMERICAN EXPORT ISBRANDTSEN LINES, INC., ET AL., *Petitioners,*

v.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

ON PETITION FOR REVIEW OF FEDERAL MARITIME COMMISSION DECISION.

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,414

AMERICAN EXPORT ISBRANDTSEN LINES, INC., et al.,
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against

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UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR REVIEW OF FEDERAL MARITIME COMMISSION DECISION

REPLY BRIEF FOR PETITIONERS

Statement

This brief will be directed to answering contentions made by the Respondents, the Federal Maritime Commission and United States of America, in their answering brief. Insofar as we are able to do so, we will endeavor to avoid repetition of arguments set forth in our opening brief.

ARGUMENT

I.

The scheme of contracts under RFP 100 is subject to and in violation of Section 14b of the Shipping Act.

The portion of the Government's answering brief devoted to a discussion of the applicability of section 14b to RFP 100 contracting consists principally of assertions that cargoes committed under the RFP 100 scheme can be considered to be cargoes moving under "volume contracts" which are said to be subject to section 14 Fourth of the Shipping Act, 1916. The section of the law which is relevant to the discussion, which is section 14b of the Shipping Act, is mentioned as a casual piece of legislation designed only to legalize the exclusive patronage dual rate contracts held illegal in *Federal Maritime Board* v. *Isbrandtsen Company*, 356 U.S. 481 (1958).

Next, the Government brief says that in some way the applicability of section 14b to the Shipping Agreements under RFP 100 was not in issue before the agency. Finally, there are two paragraphs stating that section 14b does not contain an exemption for military cargo—a proposition with which we thoroughly agree.

It seems appropriate to deal first with the suggestion that the entire tying scheme was not in issue before the agency, and then with the cavalier treatment afforded section 14b.

A. The Entire Contracting Scheme Under RFP 100 Is In Issue.

The package of papers composing Request for Proposals No. 100 ("RFP 100") of the Military Sea Transportation Service is reprinted in large part in the Joint Appendix (JA 17-41). These papers constitute a single unified scheme for tying military cargo to those carriers signing up under

the contracting system specified. The documents begin with the June 15, 1966 notice signed by the contracting officer (JA 10); they continue with the Instructions to Offerors (JA 17), with the elaborate multi-part "Shipping Agreement (Common Carriage)" form (JA 23), and with various rate sheets (JA 34). The package of documents ends with two page "Cargo Commitment" which is a supplement to the shipping agreement.

There can be no question that the Cargo Commitment is an addendum to the basic Shipping Agreement—because it says so:

> "WHEREAS, the parties have as of this date entered into a Shipping Agreement as designated above. . . . " (JA 38).

The contracting officer's notice and the instructions to offerors also make it clear that under RFP 100 MSTS expects all carriers who are going to carry military cargo to sign Shipping Agreements. Carriers signing the cargo commitment have also signed the Shipping Agreement; if they do not sign the Shipping Agreement they are not eligible to have a cargo commitment made to them. (Instructions to Offerors, paragraph 2, JA 17).

In a sense, then, there is a double tying system under RFP 100. All military cargo is preferentially reserved for carriers entering into the Shipping Agreement, and in addition to this tying device, a portion of the reserved cargo is being specifically set aside when cargo commitments are entered into. The tying under the "Cargo Commitment" addendum to the Shipping Agreement is a little tighter than without the Cargo Commitment, but as was shown in our opening brief, the tying scheme is subject to section 14b of the Shipping Act whether or not the Cargo Commitment is executed.

In any event, it is plain that the Federal Maritime Commission could not consider the legality of the arrange-

ments made with a carrier signing the Cargo Commitment unless it considered the validity of the Shipping Agreement. Every carrier signing a Cargo Commitment has signed up for the many pages of the Shipping Agreement preceding the Cargo Commitment. In short, the Cargo Commitment tying scheme includes the Shipping Agreement tying scheme. The Federal Maritime Commission could have considered the legality of the Shipping Agreement, excluding the two-page Cargo Commitment addendum, but it could not consider the Cargo Commitment without considering what it includes, which is the entire Shipping Agreement. We think this was plain to the agency, and in fact, the arguments to the agency explicitly discussed the legality of the Shipping Agreement tying scheme without the Cargo Commitment addendum (JA 55).

The entire scheme established by RFP 100 can be best viewed as a whole. As a whole, it constitutes a single powerful tying device to tie military cargo to a group of contracting carriers and to exclude all other carriers from the carriage of the tied cargo. And as a tying device, the entire scheme is plainly subject to section 14b of the Shipping Act.

B. The Government Brief Misses The Whole Point Of The Isbrandtsen Precedent.

The basic position in the Government brief appears to consist of a three-step logical fallacy: (1) the statement that RFP 100 contracts are subject to section 14 Fourth of the Shipping Act, 1916, if they are volume contracts, (2) the assertion that such volume contracts were held legal by the Supreme Court in *Federal Maritime Board* v. *Isbrandtsen Company, supra*, and (3) the claim that section 14b made no changes in the law. Each link in this chain is false.

First, it is neither logically nor legally sound to say that because a particular scheme might violate one section

of a statute it cannot also be governed by another section of the statute. For example, an unfiled agreement may be illegal under section 15 of the Shipping Act, and may also be an agreement calling for a rebate which is illegal under sections 14 and 16 of the Shipping Act.

Second, the *Isbrandtsen* decision is not a decision approving "volume contracts"; it is a decision disapproving tying devices—predatory, competition-stifling devices—used to tie cargo to particular carriers or groups.

Third, section 14b is simply not a piece of legislation which does no more than reverse the Supreme Court's decision in *Federal Maritime Board* v. *Isbrandtsen Company*. It is, and on its face it shows that it is, a comprehensive piece of remedial legislation.

1. *Contracts Subject to Section 14 Fourth Of The Shipping Act, 1916, Can Be And Are Also Subject To Other Sections Of The Shipping Act.*

The Government brief and the decision of the Federal Maritime Commission rely heavily on the curious logic that section 14b of the Shipping Act cannot apply to RFP 100 contracts because section 14 Fourth of the Shipping Act prohibits "any unfair or unjustly discriminatory contract of any shipper based on the volume of freight offered . . ." The argument seems to be that if a contract is of the type which does not violate section 14 Fourth, it is necessarily insulated from the comprehensive provisions of section 14b. Such logic is baffling.

It is doubtless well and good and in the public interest if the RFP 100 scheme does not make unjustly discriminatory arrangements between the favored carriers and the favored shipper dealing with—say—adjustment of claims; but whether it does or does not simply has no effect on the applicability of section 14b.

The Government brief says that some "volume contracts" and some contracts for "project rates" are legal under section 14 Fourth. Granted, there are contracts which are legal under section 14 Fourth and there are contracts which are illegal under section 14 Fourth. Neither their legality nor illegality under section 14 Fourth affects the applicability of section 14b, which is a comprehensive piece of legislation governing the form of acceptable tying agreements between carriers and shippers.

If there were any conflict between section 14b and section 14 Fourth, it is plain from the face of section 14b, that this is the later, more comprehensive and controlling piece of legislation. Section 14b begins: "notwithstanding any other provisions of this Act . . ." and then goes on for two pages to specify exactly what contracting schemes the Commission may or may not approve, ending with a warning that the carrying out of any scheme before approval is illegal. If there were a conflict between section 14 Fourth and section 14b—and none can be discerned on a reasonable reading of both sections—then section 14b by its terms must control.

2. *The Isbrandtsen Precedent.*

The Government brief quotes extensively from the *Isbrandtsen* case and appears to find comfort in the language of that case which distinguishes requirements contracts from the dual rate scheme there being struck down. As we point out in the next section of this brief, the law is not the same today as it was at the time of the *Isbrandtsen* decision because Congress has enacted a comprehensvie regulatory scheme governing use of dual rate contracts. But even if section 14b were not in existence, it is plain enough that the teaching of the *Isbrandtsen* case would strike down the comprehensive tying scheme embodied in RFP 100.

The *Isbrandtsen* precedent is a case construing section 14 Third of the Shipping Act, 46 U.S.C. § 812 Third. The

Supreme Court there said that in enacting section 14 as a whole Congress "has flatly prohibited practices of conferences which have the purpose and effect of stifling the competition of independent carriers" (356 U.S. at 491). Further, the Court said that "the revealed Congressional purpose in § 14 Third . . . was to outlaw practices in addition to those specifically prohibited elsewhere in the Section *when such practices are used to stifle the competition of independent carriers.*" (356 U.S. at 495; emphasis supplied).

Of course, the Court in *Isbrandtsen* distinguished illegal tying arrangements from requirements contracts, but it distinguishes such contracts when they were not used to stifle outside competition.

We have shown in our opening brief—and RFP 100 shows on its face—that the scheme of contracting contemplated by RFP 100 is designed to exclude *all* independent carriers not choosing to sign up in the system. True, the right is reserved to ship military cargo at ordinary tariff terms, but it is plain from the Instructions to Offerors that military cargo is going to be reserved in substantial entirety for carriers entering the restrictive scheme (JA 17). This is the touchstone of the applicability of the *Isbrandtsen* reading of section 14 Third. Legality under *Isbrandtsen* depends on whether or not outside competition is stifled by the contracts. Outside competition is stifled by the two-step tying scheme under RFP 100, and even if *Isbrandtsen* were not reinforced by section 14b and RFP 100 scheme would have to be struck down.

3. Section 14b Is Not Designed Simply To Legalize What Isbrandtsen Held Illegal.

If we had to stand or fall in this case on a single proposition, we would choose to stand on the proposition that the following textual and footnote statements in the Government's brief are 100% wrong:

> "The very purpose of Section 14b (46 U.S.C. 813a) was to render lawful those contracts struck down by the Supreme Court in *Isbrandtsen.*" [11]
>
> "[11] See House Report No. 498 87th Cong., 1st Sess., 1961 at pages 3-7 and Senate Report No. 842, 87th Cong., 1st Sess., 1961 at pages 1-11. Petitioners continually criticize the Commission for narrowly construing a 'major piece of remedial legislation'. Whatever may be the proper characterization of P.L. 87-346 in its entirety, it is beyond dispute that the sole purpose of section 14b was to legalize those contracts which it appeared the Court in *Isbrandtsen* had declared unlawful."

The same thought appears later in the Government brief in Note 14:

> "[14] The plain language of Section 14b demonstrates that the overriding intent of Congress in enacting Section 14b was to admit conferences and individual common carriers to continue to use a device designed to tie shippers to these carriers or conferences. The section is simply not directed to the use of contractors by shippers."

Section 14b evidences extreme Congressional concern with all details of any scheme tying shippers and carriers. It occupies two solid pages of type. It was debated at length. It simply does not have the single purpose of rendering lawful contracts which were held unlawful in *Isbrandtsen.* There was once a piece of legislation which had that single purpose: that piece of legislation was the moratorium legislation which followed the *Isbrandtsen* decision and preceded the comprehensive statutory controls created in section 14b.

Of course, under section 14b some contracts are legal which would have been illegal under the construction of section 14 Third enunciated in the *Isbrandtsen* decision. But the critical precondition to the legality of any contracting scheme under 14b is submission of a contract complying with all statutory requirements to the Commission *and approval after notice and hearing.* The RFP 100 scheme of contract has not been submitted to the Commission for approval, there has been no notice and there has been no

hearing, and even if the contracting scheme could pass scrutiny in a hearing, it is illegal as it now stands because there has been no compliance with the statutory procedures.

The Government brief quarrels with our characterization of section 14b as "a major piece of remedial legislation". We think these words completely justified by the scope and detail of the statutory language. When an agency is entrusted by the Congress with the administration of a statute such as section 14b the agency owes the Congress a hospitable interpretation of the law. We are not concerned here, however, with whether the agency wants to apply section 14b broadly or narrowly but with the inescapable demands of the statute. The agency can say that section 14b merely legalizes what *Isbrandtsen* made illegal. What the agency cannot do is say that the statute makes anything legal until there has been a proper submission of a complying contract to the Commission for its approval.

The argument in the Government brief seems to be that if section 14b was intended only to legalize what *Isbrandtsen* held to be illegal, the "requirements contracts" or volume contracts can escape the reach of section 14b. As we have shown above, the critical question is not whether a contract is called a "requirements contract" or a "project rate" or called anything else. Instead, the critical questions are (1) what the contracts do, and (2) what section 14b says. We have shown above and in our opening brief that the effect of the RFP 100 contracting scheme is to freeze competition. It may be appropriate here to re-emphasize that in addition to looking at what the contract scheme does, the Commission should have looked at the language of section 14b. We repeat that the language of section 14b is broad and unrestricted, and that it applies to the use by any common carrier and any shipper of contracts providing lower rates in return for exclusive or partially exclusive patronage.[1]

[1] RFP 100 and the Shipping Agreement thereunder make it explicit throughout that common carriage of cargo is what is being procured (JA 17 *et seq.*).

The first place to look for the meaning of section 14b is in section 14b, and we are content to rest on what the statute says and obviously means.[2]

4. *The Absence of a Statutory Exemption For Government Cargo.*

In our opening brief we were at pains to show that the legislative history of section 14b reveals a Congressional refusal to exempt Government cargoes (Petitioner's Brief 15-16). The Government brief now devotes two paragraphs to saying that ". . . the Commission never ruled, implicitly or explicitly, that the government warrants any preferred status under the Act." We are glad to have this made plain and we are agreed that there is no such exemption. Our agreement does not extend to the last sentence of Section I. C. of the Government's brief which says—without argument or proof—that the Government is not a "shipper" or "consignee" under section 14b. To the contrary, if Government cargo is not exempt from section 14b, then the Government is a shipper or consignee, or both, and the section applies.

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[2] There is a suggestion in Note 9 to the Government brief that shippers cannot violate section 14 Third of the Shipping Act. The apparent intention is to extend this premise to the conclusion that shippers cannot violate section 14b of the Shipping Act. They can —because section 14b makes the *contracts* illegal if not approved. We suggest that section 14b applies to competition-limiting contracting schemes, and that it makes absolutely no difference whether the major shipper with economic power demands the contracts, or whether a group of carriers is seeking to impose the contracts. Monopsony and Monopoly are both regulated.

II.

Section 16 of the Shipping Act is not limited to the practices enumerated therein, but, rather, clearly covers the present situation.

In our opening brief, we demonstrated that the prohibitions of the first paragraph of section 16 are not limited to the specifically enumerated practices of "false billing, false classification, false weighing, [and] false report of weight," but, as the statute in terms provides, extend to all other "unjust or unfair device or means" designed to obtain transportation at less than the rates which would otherwise apply. We referred the Court, in this regard, to decisions of the Federal Maritime Board, *Pacific Far East Lines, Inc. Storage Practices*, 6 F.M.B. 301 (1961), and *Practices of Fabre Line and the Gulf/Mediterranean Conference*, 4 F.M.B. 611 (1955), in which the Federal Maritime Commission's predecessor agency so interpreted the statute (Petitioners Brief 27-28). In our opening brief, we demonstrated as well that the element of affirmative concealment of the rate reduction has been viewed by decided cases as the touchstone of an "unjust or unfair device or means," and that the MSTS procurement practice, which freezes the competitive position of all carriers in a given trade for a full year based on a single, secret bid, in practical effect produces the concealment of rates and the distortion of competition which the statute was intended to bar. (Petitioners Brief 28-30.) We demonstrated finally that the filing of rates with the Commission after they have been established in secret with MSTS and after the tariff notice can in no way be put to its intended use, does not, as the Commission suggests, save the procurement procedure from conflict with the statute. This is plain from the language of the statute itself, which does not narrowly bar only deviations from the tariff rate, but which broadly applies

to deviations from the rates "which otherwise would be applicable." It is also made plain by the legislative history of the measure which shows: an initial interpretation that the statute barred legitimate as well as improper negotiations by a shipper with a carrier as to future rates; that the statute was amended to overcome this barrier to negotiation of rates, insofar, in the terms of the House Committee Report, as it might affect "legitimate" practices and negotiations of rates "which would otherwise be legal," H. Rept. No. 2598, 74th Congress, 2d Sess., p. 3; and that, as part of these amendments, the present statutory reference to deviation from rates "which otherwise would be applicable" was substituted for the references as originally appearing in the bill to deviation from "regular rates or charges then in force" or "regular rates or charges in force by such common carrier at the time of such transportation. . . ."

The Commission's brief, in dealing with the issues under Section 16, is either a paraphrase of the Commission's decision below, or an extended quotation of legislative materials largely duplicating that which can be found in our opening brief. We do not consider that it requires additional comment or reply.

Conclusion

For the foregoing reasons, Petitioners pray that this Court:

1. Set aside a report and order of the Commission served on August 9, 1966; and

2. Grant such other or further relief as to the cause may require or as may be deemed just and proper.

Respectfully submitted,

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ON PETITION TO REVIEW AN ORDER OF THE
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QUESTIONS PRESENTED

1. Whether the contracts for ocean carriage of military cargo required by Request for Proposals No. 100 of the Military Sea Transportation Service are dual rate contracts within the meaning of section 14b of the Shipping Act, 1916?

2. Whether the bidding requirements established by Request for Proposals No. 100 are unjust or unfair devices or means within the meaning of the first paragraph of section 16 of the Shipping Act, 1916?

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COUNTERSTATEMENT OF THE CASE

On June 16, 1966, the Military Sea Transportation Service (MSTS) issued Request For Proposals No. 100 (RFP 100) which contained the rates, terms, and conditions under which the Department of Defense proposed to extend competitive bidding methods to the procurement of ocean transportation for Department of Defense cargoes. Previously, rates on military cargoes had been fixed by negotiations between MSTS and the U.S. flag carriers acting in concert pursuant to agreements approved by the Federal Maritime Commission under section 15 of the Shipping Act, 1916 (46 U.S.C. 814).[1/]

Under RFP 100, any U.S. flag line[2/] desiring to carry military cargo (designated the offeror under RFP 100) must submit a "basic offer" which is nothing more than a quotation of the rates at which the offeror will carry military cargoes. These rates must be guaranteed for one year. The offer must be submitted under seal and the offeror certifies that he has reached his bid or rate quotation independently, without consultation with or disclosure to any other offeror, or, in the alternative, he must certify the conditions and circumstances of the consultation or disclosure, if any.

1/ These agreements are The Atlantic and Gulf American-Flag Berth Operators Agreement, No. F.M.C. 8086; the West Coast American-Flag Berth Operators Agreement, No. F.M.C. 8186 and the American-Flag Berth Operators Joint Agreement F.M.C. No. 8750.

2/ The program was open only to U.S. flag carriers since Department of Defense cargoes are reserved to them by the Cargo Preference Act of 1904 (10 U.S.C. 2631).

Once the basic offers have been submitted and analyzed, MSTS and the selected offerors will enter into a Shipping Agreement which is the same form of contract long used by MSTS for the carriage of its cargoes with only minor revisions.[3/] Actual bookings of cargoes under RFP 100 are made first with the carrier who has offered the lowest rate, provided he offers suitable space and an acceptable schedule of delivery. Failing this, the cargo is booked with the line offering the next lowest rate and so on.

Upon the award of Shipping Agreements for a given trade, the holders thereof are "protected from competition" and rate stability is sought to be achieved as follows: If another holder of a Shipping Agreement reduces his rate, his competitive position vis-a-vis other holders is considered on the basis of his original bid; and while a new carrier entering the trade may be awarded a Shipping Agreement, his service is used only if the original holders on that route cannot provide suitable service; and, finally, lines who either did not bid or were not awarded Shipping Agreements are used only if the services or capabilities of the holders on the route are inadequate.

Under RFP 100, a second type of offer may be made. Any line which makes a basic offer may also submit an alternate offer which seeks a "Cargo Commitment" from MSTS. This offer is submitted if a line feels that a

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3/ The Shipping Agreement itself does not commit MSTS to the shipment of any cargo with the line entering into the agreement. The Shipping Agreement is in three parts. Part I, Conditions of Service; Part II, Standard Maritime Clauses; and Part III, Standard Government Contract Clauses. The agreement sets forth the basic conditions under which any cargoes that may be booked with the agreeing lines are to be carried.

firm commitment to ship a minimum volume of cargo per sailing is necessary to enable the line to offer its best rates or to establish service on a particular route. Offers based on minimum volume will not be considered unless the line has also submitted a basic offer. When a minimum volume offer is accepted and a Cargo Commitment is issued, the line agrees to furnish sufficient space for the minimum amounts of cargo to be booked on each of its sailings. Default on the part of either party results in payment of "dead freight" under the contract. MSTS does not contemplate, except possibly for special services, that Cargo Commitments will be awarded to exceed fifty percent of the total requirement on any given trade route or that any individual Cargo Commitment will result in the use of more than fifty percent of the space of any single carrier on a given route.

Between June 27 and July 11, 1966, petitioners here filed with the Federal Maritime Commission (hereinafter the Commission) petitions seeking orders that RFP 100 is unlawful under a number of the provisions of the Shipping Act, 1916 (46 U.S.C. 801 et seq.). By order served July 29, 1966, the Commission agreed to entertain the petitions insofar as they raised issues under sections 14b, 15, the first paragraph of section 16 and 16 Second (46 U.S.C. 813a, 814 and 815).[4/]

4/ The lawfulness of RFP 100 was also challenged under section 14 Fourth, 16 First, 17 and 18(b)(5) (46 U.S.C. 812, 815, 816, and 817). The Commission declined to entertain the petitions insofar as they sought to raise these issues on the grounds that they were premature and did not present the Commission with a justiciable controversy. No review is sought here of this denial.

On August 9, 1966, the Commission issued the decision here under review. In that decision, the Commission concluded, inter alia, that the Cargo Commitment was not a dual rate contract within the meaning of section 14b (46 U.S.C. 813a) and that the requirement that bids submitted under the proposed competitive procurement program must be under seal and "secret" did not constitute an unjust or unfair device or means within the meaning of the first paragraph of section 16 or section 16 Second (46 U.S.C. 815). Thereafter, on August 19, 1966, the petition for review of the Commission's decision was filed with this Court.

SUMMARY OF ARGUMENT

I. By the issuance of RFP No. 100, the Military Sea Transportation Service seeks to place the procurement of ocean transportation for military cargoes upon a competitive basis. The Cargo Commitment contracts which may be awarded under RFP 100 are not "dual rate" contracts subject to the requirements of section 14b (46 U.S.C. 813a), i.e. contracts which bind shipper and carrier as to a "fixed portion" of the former's cargo. Under RFP 100, a carrier which feels that a guaranteed minimum quantity of cargo per sailing will enable it to offer a lower rate may bid for a Cargo Commitment. Under such a contract, MSTS guarantees to ship a minimum quantity of freight per sailing for a specified number of sailings and the carrier agrees to furnish space sufficient to handle the agreed minimum. Default by either party results in penalties under the contract. Thus, the Cargo Commitment is in the nature of a requirements contract which the Supreme Court in Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481 (1958), distinguished from an exclusive patronage dual rate contract and therefore found lawful under the Shipping Act. The Cargo Commitment is a contract based on the volume of freight offered within the meaning of section 14 Fourth (46 U.S.C. 812), and it is lawful unless it is unjustly discriminatory or unfair. The determination that the Cargo Commitment is a volume contract under section 14 Fourth and not a dual rate contract under section 14b is not, as urged by petitioners, dependent upon a finding that the Government enjoys a preferential status vis-a-vis other shippers.

In arguing that the Shipping Agreements awarded under RFP 100 are dual rate contracts, petitioners are seeking to raise an issue that was not heard by the Commission. Having failed to show any extraordinary circumstances for failing to raise the issue before the agency, they may not do so now.

II. The requirement in RFP 100 that bids be independently reached and submitted under seal does not constitute the use of an unjust device or means within the meaning of the first paragraph of section 16. Absent an approved agreement under section 15 of the Shipping Act (46 U.S.C. 814), no carrier has the right to know what rates his competitor has bid so long as the rates are not put into effect prior to proper publication and filing with the Commission under section 18(b)(46 U.S.C. 817(b)). Section 16, first paragraph, is aimed at attempts by shippers to obtain transportation at less than tariff rates in effect at the time of shipment. It cannot be construed to outlaw competitive bidding under RFP 100 since all rates bid thereunder will be filed with the Commission under section 18(b) before they can be utilized.

ARGUMENT

I. THE CARGO COMMITMENT CONTRACT IS NOT A DUAL RATE CONTRACT SUBJECT TO SECTION 14b OF THE SHIPPING ACT, 1916.

A. The Cargo Commitment is a Contract Based on Volume of Freight Offered Subject to Section 14 Fourth of the Shipping Act, Not Section 14b.

The Cargo Commitment is a "contract based upon . . . volume of freight" within the meaning of section 14 Fourth of the Shipping Act (46 U.S.C. 812).[6/] It is not a dual rate contract subject to the requirements of section 14b (46 U.S.C. 813a). Under a Cargo Commitment, MSTS obligates itself to furnish a specified volume of cargo per sailing for a fixed number of sailings. In return for this minimum volume of cargo, the bidding line provides a lower rate and guarantees enough space on each sailing to handle the agreed minimum amount of cargo. Default by either party results in the payment of damages under the contract. Thus, the Cargo Commitment is very similar to a requirements contract, and the latter has never been considered a "dual rate" contract under the Shipping Act, 1916.

In Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481 (1958), the Supreme Court recognized the difference between requirements or volume contracts and dual rate contracts under the Shipping Act in striking

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6/ Section 14 Fourth of the Shipping Act provides in relevant part that it shall be unlawful for any common carrier to "[m]ake any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, ..."

down the so-called exclusive patronage dual rate contract of the Japan-Atlantic and Gulf Freight Conference as unlawful under section 14 Third of the Shipping Act.[7/] In that case, the Board argued that the contracts in question had to be lawful because the legislative history of the Shipping Act clearly demonstrated that while Congress was aware that the use of dual rate contracts as tying devices was widespread, it had not outlawed such contracts even though it had specifically outlawed other tying devices such as the deferred rebate prohibited by section 14 Second (46 U.S.C. 812). In rejecting this contention, the Court, quoting from the Alexander Committee Report, pointed out that the contracts "recognized" by Congress were:

> " . . . made for the account of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers at regular intervals and the shipper agrees to confine all shipments to conference steamers, and to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage."

The Court went on to state:

> These contracts were very similar to ordinary requirements contracts. They obligated all members of the Conference to furnish steamers at regular intervals and at rates effective for a reasonably long period, sometimes a year. The shipper was thus assured of the stability of service and rates which were of paramount importance to him. Moreover, a breach of the contract subjected the shipper to ordinary damages. (356 U.S. at 493-494).

7/ Section 14 Third makes it unlawful for a common carrier to "Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or to resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."

The Court then went on to distinguish contracts such as these from the exclusive patronage dual rate contract then before it, saying:

> By contrast, the dual rate contracts here require the carriers to carry the shipper's cargo only "so far as their regular services are available"; rates are "subject to reasonable increase" within two calendar months plus the unexpired portion of the month after notice of the increase is given; "[e]ach Member of the Conference is responsible for its own part only in this Agreement"; the agreement is terminable by either party on three months' notice; and for a breach, "the Shipper shall pay as liquidated damages to the Carriers fifty percentum (50%) of the amount of freight which the Shipper would have paid had such shipment been made in a vessel of the Carriers at the Contract rate currently in effect." Until payment of the liquidated damages the shipper is denied the reduced rate, and if he violates the agreement more than once in 12 months, he suffers cancellation of the agreement and denial of another until all liquidated damages have been paid in full. (356 U.S. at 494-495). 8/

It is clear on its face that the Cargo Commitment of RFP 100 is just that kind of contract which the Supreme Court found similar to an ordinary requirements contract and lawful under the Shipping Act. The Cargo Commitment obligates the carrier to furnish steamers (a specified amount of space) at regular intervals (by sailing) and at rates effective for a reasonably

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8/ Moreover, the distinction between a volume contract and an exclusive patronage contract was not new with the Supreme Court in the Isbrandtsen case. It was clearly made on at least two occasions by the United States Shipping Board, a predecessor of the Commission. See Atlantic Refining Co. v. Ellerman & Bucknall S.S. Co., 1 U.S.S.B. 242 (1932) and Rawleighv. Stoomvaart et al., 1 U.S.S.B. 285 (1933).

long period, sometimes a year (the specified period in the Cargo Commitment is one year).[9/] Moreover, the Cargo Commitment is even more like a volume contract than the requirements contract in Isbrandtsen since the Cargo Commitment is sought only if the bidding line feels that the guarantee of a minimum volume or amount of cargo per sailing is necessary to afford MSTS the lowest possible rate. Further, unlike a dual rate contract, rates under a Cargo Commitment are intended to bear a direct relationship to the specific amount of cargo offered under the contract.

Almost immediately after the Supreme Court's decision in Isbrandtsen, Congress moved, through "moratorium" or "interim" legislation, to preserve the legality of the dual rate system until such time as it could enact permanent legislation.[10/] In 1961, Congress enacted P.L. 87-346 (75 Stat. 762)

9/ Petitioners allege that the Commission has misread the Isbrandtsen case, arguing that the contracts under RFP 100 "would be unlawful under the decision in Isbrandtsen as a device to stifle outside competition in violation of section 14 Third." Here again, petitioners' argument appears to be directed to the Shipping Agreements which are awarded on the basis of "open end" offers and not [to] the Cargo Commitment. As we will show infra, the question of the validity of the Shipping Agreements under 14b, and thus indirectly under Isbrandtsen, was never entertained by the Commission, and is improperly urged here. Besides, petitioners have ignored the express language of the statute. The proscriptions in section 14 Third (46 U.S.C. 812) are aimed exclusively at common carriers by water. It is difficult to imagine how a shipper could violate the section. We submit that the contracts under RFP 100 would clearly have been lawful under the Shipping Act, 1916, at the time of the Supreme Court's decision in Isbrandtsen and that the subsequent passage of section 14b in no way altered this status.

10/ P.L. 85-626, 85th Cong., S. 2916 (August 12, 1958) amended by P.L. 86-542, 86th Cong., HR 10840 (June 29, 1960), further amended by P.L. 87-75, 87th Cong. 32154 (June 30, 1961).

which, among other things, added section 14b to the Shipping Act. The very purpose of section 14b (46 U.S.C. 813a) was to render lawful those contracts struck down by the Supreme Court in Isbrandtsen.[11] No mention whatsoever is made in either the language of section 14b or its legislative history of section 14 Fourth and the contracts which are lawful thereunder unless unfair or unjustly discriminatory. Yet if petitioners' argument is accepted, that which is clearly a volume contract within the meaning of section 14 Fourth would be unlawful if it failed to meet the requirements of section 14b. The mere existence of the two sections makes it clear that not every contract that a shipper makes with a carrier is a dual rate contract. Thus, the Cargo Commitment is a contract based on volume of freight offered and is subject to the requirements of section 14 Fourth, not section 14b.

Nor does the language in section 14b "or any fixed portion" lead to a contrary result. The only references to this language in the legislative history of section 14b make clear that it was inserted[12] solely to permit a dual rate contract based on some percentage of the shipper's volume less than 100 per cent. The reading of this language which is urged by petitioners would make all contracts based on volume subject to commission approval under the lengthy procedures of section 14b. However, the carriers have never

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11/ See House Report No. 498, 87th Cong. 1st Sess., 1961 at pages 3-7 and Senate Report No. 842, 87th Cong. 1st Sess., 1961 at pages 1-11. Petitioners continually criticize the Commission for narrowly construing a "major piece of remedial legislation". Whatever may be the proper characterization of P.L. 87-346 in its entirety, it is beyond dispute that the sole purpose of section 14b was to legalize those contracts which it appeared the Court in Isbrandtsen had declared unlawful.

12/ Earlier bills did not contain these words.

acted in accordance with this interpretation because they have never submitted contracts for project rates [13] and other individually negotiated agreements founded on guaranteed tonnage to the Commission for approval under section 14b. Thus, their suggestion is not only erroneous, but it is inconsistent with their previous practice.

B. The Issue of Whether Shipping Agreements Are Dual Rate Contracts Subject to Section 14b of the Shipping Act Was Not Raised Before the Commission and May Not be Raised on Review.

In its order of July 19, 1966, the Commission agreed to hear argument on three explicit issues:

> 1. Whether the Cargo Commitment contract contemplated under the MSTS Request For Proposals No. 100 is a dual rate contract the approval of which by the Commission is required before its use may be permitted in the foreign commerce of the United States.
>
> 2. What, if any, specific provisions of approved section 15 Agreements would prohibit any of the carriers signatory thereto and parties to this proceeding from responding to the MSTS Request For Proposals No. 100 and if there are any whether they should be disapproved, cancelled or modified under section 15.

13/ Project rates are reduced rates on the materials and equipment to be employed by the shipper or consignee in the construction or development and, in some cases, the maintenance and operation, of a certain, named facility used in manufacturing processes, the exploitation of natural resources (including agricultural), or other productive enterprise or service facility. The materials and equipment may not be shipped for the purpose of resale and all cargoes of shippers who receive the benefit of such rates and which move in the particular trade for use in the same enterprise or facility are to be shipped exclusively on the vessels of the rate-maker.

> 3. Whether the requirement that bids submitted in response to the MSTS Request For Proposals be under seal and not disclosed by the bidder line constitutes an unjust device or means for obtaining or attempting to obtain transportation at less than the regular rates and charges then established and enforced on the line of such carrier. (JA 7).

The only issue upon which the Commission agreed to consider the issuance of a declaratory order under section 14b of the Act was whether the Cargo Commitment was a dual rate contract within the meaning of that section. The petitions seeking declaratory orders from the Commission raised no other issue under 14b. Petitioners now, however, seek to introduce the question of whether "the new contract system envisaged by RFP 100 is a system of dual rate contracts" under section 14b. By this, petitioners now for the first time raise the question of whether the Shipping Agreements which are awarded on the basis of "open end" bids are dual rate contracts. Petitioners, since they have not shown any extraordinary circumstances for failing to raise this issue before the Commission, are foreclosed from raising it now.[14/] Unemployment Compensation Commission of Alaska v. Arogan, 329 U.S. 143 (1946).

14/ The plain language of section 14b demonstrates that the overriding intent of Congress in enacting section 14b was to permit conferences and individual common carriers to continue to use a device designed to tie shippers to these carriers or conferences. The section is simply not directed to the use of contracts by shippers. Moreover, the Shipping Agreement is not a "tying device", as it does not prevent the holders of an agreement from carrying any other cargo. To equate competitive bidding with the anticompetitive tying device governed by section 14b is erroneous.

C. The Absence of a Specific Statutory Exemption For Government Cargo Does Not Render RFP 100 Unlawful.

The lawfulness of the competitive bidding system under RFP 100 is in no way concerned with any special status of the Government as a shipper under the Act. Petitioners, however, seem to make much of the absence from the Shipping Act of any express provision in the Act authorizing reduced rates for the Government. However, we find it difficult to answer petitioners' attack on the Commission's handling of this problem, since nowhere do petitioners say just what they seek to prove by showing the absence of statutory exemption for special rates for government cargo. Perhaps they are attempting to show nothing more than that ". . . unless government cargo was exempted from the legislation being passed [section 14b], it would be held subject to that legislation . . . ." But, as the Commission pointed out, none of its reasons for concluding that the Cargo Commitment was not a dual rate contract were dependent upon a finding that the government enjoyed any special status under the Shipping Act. (JA 75). The Commission went on, moreover, to point out that it considered petitioners' authorities inapposite. (JA 76-77). But, in fact, the Commission never ruled, implicitly or explicitly, that the government warrants any preferred status under the Act.

The Commission concluded that petitioners' contentions were based "upon the assumption that unless the Government is some type of preferred status shipper under the Act, it is a 'shipper' within the meaning of section 14b and therefore, the Cargo Commitment is a dual rate contract." (JA 77). The Commis[illegible].

however, on the basis of the legislative history and administrative practice concluded that the terms "shipper" and "consignee" as used in section 14b have a distinct and somewhat limited frame of reference - that of commercial enterprise - and it does not follow that every shipper and consignee in foreign commerce is a shipper or consignee within the meaning of section 14b. (JA 77-78).

II. THE COMPETITIVE BIDDING REQUIREMENTS ESTABLISHED BY REQUEST FOR PROPOSALS NO. 100 ARE NOT UNJUST OR UNFAIR DEVICES OR MEANS WITHIN THE MEANING OF THE FIRST PARAGRAPH OF SECTION 16 OF THE SHIPPING ACT, 1916.

Under RFP 100, all U.S. flag carriers desiring to carry military cargo must "bid" their rates under seal and the bids must be accompanied by a certificate that the bidder or offeror has reached his bid independently without consultation with or disclosure to any other offeror, or he must certify as to the circumstances and conditions of any disclosure or consultation which may have occurred. It is this requirement that petitioners urge violates the first paragraph of section 16 (46 U.S.C. 815) which provides:

> That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and wilfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

It is difficult to conceive of a greater misapplication of this statutory provision than that urged by petitioners. The basic purpose of section 16

is to insure adherence by a carrier to his publicly announced rates, not to foreclose any change in those rates at the behest of an individual shipper.

The section clearly proscribes not the modification of a tariff rate, but rather payment by a shipper of a rate lower than the published tariff rate. Thus, it is unlawful to misclassify an article to obtain a lower rate;[15] to rebate a portion of the freight rate to a particular shipper;[16] to withhold information from the carrier essential to a determination of the proper rate;[17] or to seek a lower rate or rebate by false billing.[18] In all of these instances, the tariff or publicly announced rate remained unchanged even after the unlawful practice was employed. Indeed, it was essential to the particular scheme involved that the tariff rate not be changed. Under RFP 100, the rates will, as we have stated supra, be filed with the Commission. It is therefore impossible for the shipper to obtain transportation at less than the rates otherwise applicable, i.e. the rates that the carrier is legally bound to charge under section 18(b)(3).

Petitioners allege that the Commission has ignored two cases on which they rely as authority for their distorted construction of section 16.[19]

15/ Royal Netherlands Steamship Co. v. Federal Maritime Board, 113 U.S. App. D.C. 62, 304 F.2d 938 (1962).

16/ U.S. v. Peninsular & Occidental S.S. Co., 208 F. Supp. 957 (S.D.N.Y. 1962).

17/ Prince Line Ltd. v. American Paper Exports Inc., 55 F.2d 1053 (2nd Cir. 1932).

18/ Hohenberg Bros. Company v. Federal Maritime Commission, 114 U.S. App. D.C. 380, 316 F.2d 381 (1963).

19/ Petitioners read section 16 as proscribing "all rate concessions of any description that are unjust and unfair" (Pets. Brief at 28) and not just those which are based upon misclassification, false billing or the withholding of information.

The first of these cases is Investigation of Storage Practices, 6 FMB 301 (1961), in which the respondents, the carrier and its purported agents, devised a scheme whereby shippers, in return for patronizing a particular port, would receive storage and other services either free or at reduced rates. Thus, the applicable tariffs showed one rate, but the favored shippers actually paid less because of the free storage scheme - a clear violation of section 16. The second case relied on by petitioners is Practices of Fabre Line and Gulf/Mediterranean Conference, 4 FMB 611 (1955), which involved allegations that respondents had granted secret absorptions, commissions, and rebates - all in violation of the applicable tariffs. This also would be a clear violation of section 16. Thus, neither case is in any way pertinent to the facts here presented.

Finally, petitioners seek to rely upon the legislative history of the first paragraph of section 16 quoted by the Commission in its decision (JA 82-83), pointing out that the bill which became law was not the bill referred to in the quotation. Petitioners offer the proposition that the change made in the bill was intended to make the first paragraph of section 16 cover "deviations from rates that might be established in the future pursuant to some scheme as well as those actually in existence and in force." (Pets. Brief, p. 33). Here, petitioners indulge in what would appear to be studied ambiguity. Their proposition is susceptible of at least two interpretations, one of which we would not quarrel with.

If, by their assertion, petitioners simply mean that once a rate is established, for whatever reason, it must be adhered to, and if by "established"

they mean filed with the Commission and published in the appropriate tariff, we have no quarrel simply because once a rate has been published and filed, both section 16 and section 18(b) require adherence to the rate. However, if petitioners are asserting that section 16 precludes agreement between a shipper and a carrier, however such agreement is reached, as to a future rate which rate is thereafter properly filed and published and thereby made available to all similarly situated shippers who can qualify for it, then petitioners have grossly misconceived the law. Nothing in the legislative history of the first paragraph of section 16 offers any support for this position. Because of the apparent seriousness with which petitioners urge the unlawfulness of RFP 100 under the first paragraph of section 16, it is perhaps worth treating in some detail their arguments purportedly based on the legislative history.

In its decision, the Commission stated that "The purpose behind these prohibitions [those contained in the first paragraph of section 16] as well as those of section 16, Second is not far to seek." (JA 82). It then quoted the following extract from House Report No. 2205 which accompanied S. 3467, 74th Cong. 2d Sess.:

> Section 16 of the Shipping Act of 1916, as amended, among other things, provides that it shall be unlawful for any common carrier by water, or other person subject to that act, to allow the transportation of property at less than the regular rates then in force by the common carrier by means of false billing or other misclassification of freight, false claims, etc. Thus it will be seen, that while the carrier is prohibited from allowing favoritism or partiality as among competing shippers, the carrier itself is afforded no protection against the practice of an unscrupulous shipper, forwarder, broker, or other delivering goods to the carrier for transportation, in deliberately misclassifying packages of freight for the purpose of obtaining a lower transportation rate at the expense of the carrier.

> The Senate measure, therefore, strengthens this portion of the Shipping Act of 1916, and goes further in providing that such a practice shall neither be engaged in by a common carrier by water nor by any shipper, consignor, consignees, forwarder, broker, or other person, or any officer, agent, or employee thereof; and provides a penalty for violations of from $1,000 to $3,000, thereby effectually removing the means left open to dishonest shippers or consignees whereby they may take advantage not only of their competitors who do not indulge in the practice of false billing and misclassification in order to receive a lower transportation rate for their freight, but also of the carrier itself by depriving the carrier of a rightful source of revenue. (Id., pp. 1-2)

The version of the first paragraph of section 16 as it appeared when the House Report was issued read:

> Sec. 16A. Any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, who shall knowingly and willfully, directly or indirectly, by false billing, false claim, false representation, or any other device or means, whether with or without the consent or connivance of the carrier, its officer, agent, or employee, obtain or attempt to obtain transportation for property by any common carrier subject to the to the [sic] provisions of the Act at less than the regular rates or charges then in force by such common carrier; or who shall knowingly and willfully, directly or indirectly, by false claim, false representation, or other device or means obtain, or attempt to obtain, any allowance, refund, or payment in connection with or growing out of the transportation of such property, whether with or without the consent or connivance of the carrier, its officer, agent, or employee, whereby the compensation of such carrier shall be less than or different from the regular rates or charges in force by such common carrier at the time of such transportation, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof in any court of the United States of competent jurisdiction, be subject for such offense to a fine of not less than $1,000 nor more than $3,000. (Emphasis supplied). (Id., pp. 3-4)

As finally enacted, the first paragraph of section 16 read:[20]

> That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent or employee thereof, knowingly and wilfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

The deleted language dealt with allowances, refunds or payments in connection with transportation. This change was explained as follows:

> Later, opposition to the bill as it passed the Senate developed from various forwarders and brokers who feared the language of the bill as it passed the Senate might be interpreted to prohibit the payment of legitimate brokerage and negotiated rates which would otherwise be legal.
>
> Suggestions were made to add a proviso that nothing in the act shall be construed to prohibit the payment of carriers of ocean freight brokerage to a bona-fide forwarder or broker. It is not the intent of this committee that the act shall be construed so as to prohibit the payment by carriers of legitimate brokerage, and it is not believed that the language of the new matter as now drawn could by any possibility interfere with the payment of legitimate brokerage. It is for this reason that a proviso to that effect is not added.
>
> It is not intended that the language of the new amendment shall prohibit any negotiated rate which at this time is permitted under the law, and it is believed that this fear on the part of shippers, consignors, consignees, forwarders, brokers or other persons is met by the use of the words "at less than the rates or charges that would otherwise be applicable." House Report No. 2598, 74th Cong. 2d Sess., pp. 2-3.

20/ This language has not been amended.

From the foregoing, it is obvious that the basic purpose of the law remained the same - to protect carriers and the shipping public from undisclosed deviation from tariff rates through concealment or misinformation. There is absolutely nothing in the section which precludes competitive bidding so long as the rates bid are properly published and filed under section 18(b) of the Act before they are put into effect.

CONCLUSION

The Cargo Commitment is not a dual rate contract under section 14b, Shipping Act, 1916. The bidding requirements established by Request For Proposals No. 100 are not unjust or unfair devices or means within the meaning of the first paragraph of section 16, Shipping Act, 1916. Accordingly, the Commission's decision should be affirmed.

Respectfully submitted,

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Brief for Intervenor Sapphire Steamship Lines, Inc.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,414

AMERICAN EXPORT ISBRANDTSEN LINES, INC., et al.,
Petitioners,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of Federal Maritime Commission Decision

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QUESTIONS PRESENTED

Intervenor agrees that the questions presented by the Petitioners are correctly stated.

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Brief for Intervenor Sapphire Steamship Lines, Inc.

ARGUMENT

Sapphire Steamship Lines, Inc. (hereinafter "Sapphire"), has been and is engaged in an unsubsidized berth liner service between ports in the United States North Atlantic range and ports in the Bordeaux-Hamburg range and the United Kingdom (Essential Trade Routes 5, 7, 8 and 9). Since the inception of its service in March, 1965, Sapphire has continuously carried substantial quantities of Government-sponsored cargoes. Sapphire is one of the berth liner operators which were awarded shipping contracts under the competitive procurement policy recently adopted by the Department of Defense, which policy is being attacked in the present proceeding.

It was Sapphire's position before the Federal Maritime Commission in FMC Docket No. 66-42 that the new Military Sea Transportation Service (hereinafter "MSTS") policy of competitive procurement of ocean shipping did not contemplate dual rate contracts of a nature which would violate Section 14b of the Shipping Act, 1916, 46 U.S.C. § 813a, and that the bidding requirements established by the Request for Proposals No. 100 were not unjust or unfair devices or means within the meaning of the first paragraph of Section 16 of the Shipping Act, 1916, 46 U.S.C. § 815. Sapphire expressed this position in briefs and in oral argument before the Commission.

In this proceeding, Sapphire reiterates its position that the MSTS policy of competitive procurement does not violate Section 14b of the Shipping Act, 1916, and that the bidding requirements in Request for Proposals No. 100 do not conflict with Section 16 of that Act. In addition, Sapphire endorses the arguments made in the briefs of MSTS Counsel and Hearing Counsel in FMC Docket No. 66-42, as well as the Report of the Commission dated August 9, 1966. All of these documents are part of the record on this appeal.

Respectfully submitted,

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December 1, 1966